an action instituted by appellants on their own behalf and on behalf of shippers as a class, to enjoin, annul and set aside orders of the Interstate Commerce Commission (Commission) authorizing nation-wide increases in railroad freight rates in a proceeding entitled Ex Parte No. 259, *Increased Freight Rates, 1968*, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the District Court for the District of Columbia is not yet officially reported. It is attached hereto as Appendix A. The Commission's initial and final reports are reported at 332 I.C.C. 590 and 332 I.C.C. 714 and copies are attached hereto as Appendix B and Appendix C, respectively.

JURISDICTION

This suit was brought pursuant to 28 U.S.C. § 1336 to set aside an order of the Commission of November 25, 1968 and, by amended and supplemental complaint, a subsequent order of January 9, 1969. The judgment of the District Court dismissing the complaint was entered December 18, 1969 and notice of appeal was filed in that Court February 4, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *City of Chicago v. United States*, 38 *Law Week* 4039, December 9, 1969; *American Trucking Association, Inc. v. Atchison T. & S. F. Ry.*, 387 U.S. 397; *United States v. Drum*, 368 U.S. 370.

STATUTES INVOLVED

Section 551, 702 and 704 of Title 5, United States Code, section 1336 of Title 28 and sections 13(1), 15(1), 15(7) and 15a(2) of Title 49 are set forth in Appendix D hereto.

QUESTION PRESENTED

May shippers, both individually and as a class, be denied judicial review of Commission orders, entered after hearing and investigation, insofar as they authorize across-the-board increases in the level of railroad freight rates and charges, and modify outstanding rate orders and grant Fourth Section relief to the extent necessary to permit the increases to become effective?

STATEMENT OF THE CASE

THE PROCEEDINGS BELOW

In Ex Parte No. 259, *Increased Freight Rates, 1968*, the nation's railroads sought authority to increase substantially all freight rates and charges by varying percentages averaging about 5 percent. It was instituted by the filing with the Commission of a petition seeking (1) permission to depart from some of the Commission's tariff filing regulations, (2) authority to make the increases effective "upon a finding that the general level of rates as increased will be just and reasonable" and (3) such other relief (including modification of outstanding orders and Fourth Section Relief) as might be necessary to permit the increases to become effective. On the following day, the Commission entered an order permitting the requested departures from its tariff filing regulations and authorizing the filing of such tariffs but subject to possible suspension.

After a preliminary hearing the Commission suspended the increases to the extent that they exceeded three per-

cent and instituted an investigation concerning their lawfulness. Thereafter the Commission entered a further order dividing the proceeding into ten parts, Sub No. 2, Railroad Cost and Revenue Needs and Sub Nos. 3-11 to each of which were assigned issues respecting specific commodities or services. The issue in Sub No. 2 was how much, if any, additional revenue was needed and should be provided by an increase in rates. The issue in the other subproceedings was how much of any increase authorized in Sub No. 2 should be borne by individual commodities or services.

On November 26, 1968, the Commission served its report and order of November 25 which was dispositive of the issues in Sub No. 2. It authorized the increases to be made effective on one day's notice and modified outstanding rate orders and granted Fourth Section Relief to the extent necessary to permit the increases to become effective. The order was "based upon the entire record, including the evidence and briefs of the parties" and contained a finding that "The increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges". (App. B, pp. 596, 609).

The present action was instituted on the following day. Appellants moved for a temporary restraining order which was denied on November 27 and the increases became effective at 12:01 A.M. November 28.

On January 9, 1969, the Commission issued a further report and order devoted primarily to the reasonableness of the allocation of the authorized increases among the various commodities and services. That report adopted the findings of the November 25, 1968 report and order with respect to the railroads' revenue needs "as though fully restated" therein and discontinued the investigation. (App. C, p. 714)

Appellants subsequently filed an amended and supplemental complaint which sought review of the January 9, 1969 order also and converted the action into a class ac-

tion in behalf of all shippers similarly situated. Appellants are either shippers or trade associations representing shippers who bear over 20 percent of the total increases approved by the Commission in Ex Parte No. 259.

Appellants challenged the lawfulness of the Commission's orders on the following grounds:

(1) The Commission did not apply the statutory standards (49 U.S.C. §15a(2), App. D p. 7) and its ultimate findings are supported neither by the requisite basic evidentiary findings nor by substantial evidence.[1]

(2) Despite wide differences in financial needs of the railroads in the eastern, western and southern districts, the Commission, without explaining or justifying such action, authorized the same measure of increase nationwide.

(3) The Commission refused to consider the unit costs of performing the various railroad transportation services.

POSITION OF DEFENDANTS BELOW

The Department of Justice filed a neutral answer. The Commission defended its order on the merits. It "expressly waive[d] the defense, suggested by *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487, 495-6 (E.D.

[1] The Commission authorized the increase on the basis of a finding that between 1966 and 1968 the railroads had incurred increased operating costs which exceeded the sum of the rate increases granted in the immediately preceding general increase case (Ex Parte No. 256, *Increased Freight Rates, 1967*), and those sought in Ex Parte No. 259. It justified the use of 1966 as a base year solely on the ground that "it reflects recent experience not complicated by a major rate revision, and the traffic volume is close to the current level." (App. B, p. 599) It made no findings as to (1) the reasonableness of the 1966 level of rates, (2) the financial needs of the railroads in the period beyond 1968, (3) the capital investment required, even for 1968, to enable the railroads to provide adequate and efficient transportation service, (4) the revenues required to finance such capital investment, or (5) the amounts needed to pay dividends.

Va. 1935), that [28 U.S.C. §§1336, 2284 and 2321-2325] do not confer jurisdiction over the permissive orders entered by the Commission." (Brief, p. 7, Answer, p. 1) Only the railroads questioned the jurisdiction of the Court.

OPINION OF THE COURT BELOW

The Court by a two to one vote (Wright J. dissenting) adopted the railroads' position. It held that it lacked jurisdiction and dismissed the action on the ground that *Algoma* was controlling. The Court stated that the increased rates are "permissive and not mandatory" and that parties may challenge "any particular rates which affect them" by filing a Section 13 proceeding with the Commission. It is not clear whether the Court was holding that the orders are not reviewable because they are "permissive" or because they are not ripe for review.

THE QUESTION IS SUBSTANTIAL

An increase in the general level of railroad freight rates affects every business and consumer directly or indirectly. Whether an order affirming such an increase is subject to judicial review is the important public interest type of question which led the Congress, many years ago, to provide for direct appeal to the Supreme Court in Commission cases.

1. Authorization to review the Commission's orders in Ex Parte No. 259 is conferred both by section 1336 of Title 28 of the United States Code which gives the District Courts jurisdiction of actions to set aside orders of the Commission and by the Administrative Procedure Act. The Commission's orders approved rates for the future. Section 551 of Title 5 defines rule as including "the approval or prescription for the future of rates" and defines agency action as including an agency rule. Agency action is made subject to court review by sections 702 and 704 of Title 5.

The modern view is that "the Administrative Procedure Act's 'generous review provisions' must be given a 'hospi-

table' interpretation" and that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress". *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-141. This basic philosophy was reaffirmed in *City of Chicago*:

> . . . we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is "persuasive reason to believe" that Congress had no such purpose. (38 L.W. 4039)

The Court below points to nothing which even remotely suggests a Congressional purpose to deny judicial review of the Commission's orders here involved.

2. The general increase case is the procedure by which the railroads obtain authority from the Commission to increase their rates and charges across the board. It is particularly important, therefore, that Commission orders in such proceedings be subject to judicial review. Railroad freight charges are a significant part of the cost of operating a business. The railroad freight bill of the nation in 1969 was over $10 billion. The public therefore has a vital interest in the Commission applying the standards of justness and reasonableness prescribed by Section 15a(2) of the Interstate Commerce Act and particularly the requirement that freight rates be at a level which will provide "adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." It would be ironic if shippers who clearly have the right to obtain court review of an order authorizing an increase in a particular rate should be denied review of an order authorizing an increase in *all* rates. Whether such an order is subject to court review has never been passed upon by this Court. This important issue should be settled.

3. That an administrative determination is permissive rather than mandatory is not a reason for denying court review. Where the Commission, after investigation, permits a rate to go into effect, the courts have always held that

an aggrieved party is entitled to review. (See e.g. *I.C.C. v. Inland Waterways Corporation*, 319 U.S. 671; *Western Paper Makers Chemical Company v. United States*, 271 U.S. 268.[2]) The recent decision in *City of Chicago*, decided subsequent to the opinion of the Court below, disposes once and for all of any contention that permissive orders are not reviewable.

Here, as in *City of Chicago*, the carriers could obtain judicial review if their petition had been denied and there is "no talismanic sign indicating that Congress desired to deny review to opponents of [the increases] alone." [38 L.W. 4039]

4. The Commission's orders did more than approve increases in rates. They also modified outstanding rate orders and granted widespread Fourth Section relief. A shipper who has obtained a maximum rate order after litigation is clearly entitled to court review of a subsequent Commission order modifying that particular order. *Chicago B&O R.R. Co. v. United States*, 242 F. Supp. 414 (N.D. Ill.) *aff'd* 382 U.S. 422. An order which modifies *all* outstanding rate orders would seem to be no less reviewable. Fourth Section orders are likewise reviewable. *A.L. Mechling Barge Lines, Inc. v. United States*, 376 U.S. 375.

5. Even assuming, arguendo, that *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487 (E.D. Va.) was correctly decided, the reliance on it by the District Court was misplaced:

(a). *Algoma*, which was decided prior to both *Rochester Telephone Corp. v. United States*, 307 U.S. 125 and the Administrative Procedure Act, places major reliance on the "permissive order" doctrine (11 F. Supp. 487, 493-4);

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[2]Other cases in which this Court has permitted review of an administrative agency's "permissive" orders include: *Skelly Oil Co. v. Phillips Petroleum*, 174 F. 2d. 89 (1949), *aff'd.* 339 U.S. 667 (1950); *C.A.B. v. State Airlines, Inc.*, 338 U.S. 572 (1950); *Yale T. Corp. v. United States*, 210 F. Supp. 862 (1962), *aff'd.* 373 U.S. 540 (1963).

(b) in *Algoma* the Court regarded the case before it as involving only a failure by the Commission to suspend (11 F. Supp. 487, 495);

(c) in *Algoma*, unlike the present case, plaintiff sought review only of the rates on a particular commodity. The railroads' need for additional revenue (and therefore for a general increase) was "conceded by all, or at least, not disputed" (11 F. Supp. 487, 494);

(d) in *Algoma*, the Court was concerned with the possibility, not here present, that lack of uniformity might result from the seeking of relief on particular rates or commodities by different shippers in different jurisdictions (11 F. Supp. 487, 496).

6. The orders below meet all tests of ripeness. The rationale of the ripeness doctrine as stated in *Abbott Laboratories v. Gardner, supra*, is:

> . . . to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. 387 U.S. 136, 148.

Applying this test to the present litigation, there can be no question but that the effects of the decision are being felt in a concrete way by appellants and by all members of the class in whose behalf this action was brought. As a result of the Commission's action, shippers are making additional payments of over $450 million a year, of which appellants' share is in the neighborhood of $100 million.

Nor can there be any serious question of the Courts "entangling themselves in abstract disagreements over adminis-

trative policies" since we have a final decision authorizing the increased rates to go into effect. The orders of the Commission here involved are unlike the regulations considered in *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, for example, which provided that the agency "*may*" take action under certain circumstances with no certainty that it would in fact do so. They are rather like the regulations in *Columbia Broadcasting System v. United States*, 316 U.S. 407; *United States v. Storer Broadcasting Co.*, 351 U.S. 192; and *Frozen Food Express v. United States*, 351 U.S. 40 which, though not affecting the parties involved as directly as the orders of the Commission in this case, were held to be sufficiently "ripe" to be subject to judicial review.

7. If denied judicial review of the orders here involved, appellants are left with no recourse. The course suggested by the Court below—that appellants "challenge any particular rates which affect them under the procedures provided in Section 13 of the I.C.C. Act" is not a remedy at all. As Judge Wright notes (App. A., p. 5) appellants "are not seeking to challenge the appropriateness of any rate or combination of rates." They are challenging the lawfulness of the increases as applied to all rates and the underlying findings of railroad revenue need. These issues are not the issues which would be involved in a proceeding involving the reasonableness of rates on particular segments of traffic.

The reasonableness of a rate necessarily involves two questions:

(1) What overall level of rates is obtained by applying the statutory standards of justness and reasonableness?

(2) Is the particular rate properly related to such overall level?

In a complaint on a particular rate, only the latter issue could be litigated. If all rates should be raised 100 percent, for example, and a particular rate had been on a reasonable

basis prior to the general increase, the Commission would necessarily hold in a complaint case that the new rate was also reasonable because it would have the same relationship to other rates and to the general level of rates.

The usual procedure in a complaint case is for the Commission to look at rates prescribed in the past and compare the new rate with such rates plus all general increases since their prescription. Thus, in *Alabama State Docks Dept. v. Alabama, T. & N.R.* Co., 321 I.C.C. 347, in finding that the assailed rates were not unjust and unreasonable, the Commission held:

> However, the assailed rate is below the maximum level prescribed on domestic clean rice in *Arkansas Rice Traffic Bureau v. Aberdeen & R.R. Co.*, 219 I.C.C. 5, 25, *as adjusted for general increases* [p. 353]. (emphasis added)

To relitigate the lawfulness of a general increase in a subsequent proceeding involving a particular rate would be wholly impracticable since this would require the equivalent of a general increase proceeding in each case. (*Cf. Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33, 44) Even if shippers could undertake such a burden, the Commission would not permit it. In *Koppers Co. Inc. v. C&O Ry. Co.*, 303 I.C.C. 383 (1958) the Commission refused to consider whether a general increase authorized in Ex Parte No. 175 was justified stating:

> Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding. [p. 387].

As Judge Wright so cogently puts it in his dissent below

> Considering challenges to the general order now would avoid needless relitigation of the same issue before the Commission in countless rate-making

> proceedings involving individual commodities. Furthermore, I think that it would be difficult if not impossible for any shipper to challenge this determination of a nationwide railroad need for revenue in the context of an individual rate-making proceeding. This is the sort of threshold issue which ought to be determined once and for all at the outset, preferably, as plaintiffs here seek to do, in a class action. (App. A, p. 5-6)

Atlantic City v. State of New York, Civil Action No. 69-800, Southern District of New York, October 28, 1969[3] seems to suggest that the proper procedure is to file a Section 13 proceeding and then seek Court review of the Commission's decision in the general increase proceeding along with review of its decision on the specific rate. Why a shipper should ever be forced to follow such a time-consuming, expensive and circuitous route is not explained. But in any event, this procedure would not be available to appellants since we are not contesting the relationship of any rate to the general level of rates. We are complaining about the general increase in all rates. Accordingly, we would have nothing to present to the Commission in a Section 13 proceeding by way of a challenge of "any particular rates" and nothing would be gained by delaying review of the Commission's order in Ex Parte No. 259 pending completion of such a proceeding.

It is submitted that the questions presented by this appeal are substantial and of great public importance. The decision of the District Court is inconsistent with established principles governing reviewability of administrative

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[3] *Atlantic City* involved reviewability of the Commission's orders in Ex Parte No. 259. It has been appealed to the Supreme Court and is docketed as No. 1083.

orders as enunciated in *Abbott Laboratories* and *City of Chicago* and the Court may deem the case appropriate for summary reversal.

Respectfully submitted.

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Attorneys for Appellants

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ALABAMA POWER COMPANY, et al.,	:	
Plaintiffs	:	
v.	:	Civil Action
UNITED STATES OF AMERICA, et al.,	:	No. 2970-68
Defendants.	:	

Messrs. Charles J. McCarthy, J. Raymond Clark and William M. Maddox argued for the plaintiffs.

Mr. William A. Imhof argued for the Secretary of Agriculture as intervening plaintiff.

Mr. Arthur J. Cerra argued for the defendant, Interstate Commerce Commission.

Mr. Richard J. Murphy argued for the railroads as intervening defendants.

Before WRIGHT, Circuit Judge; TAMM, Circuit Judge; and CORCORAN, District Judge.

OPINION

Corcoran, District Judge: This action was instituted by several groups of shippers to enjoin, annul and set aside certain rate increase orders of the Interstate Commerce Commission entered November 26, 1968 and January 9, 1969 in *Ex Parte No. 259, Increased Freight Rates, 1968*.[1] These orders permitted Class I railroads of the United States to effect a general increase in their freight rates and charges to offset the increase in expenses which had occurred in the 1967-1968 period.

The Secretary of Agriculture intervened as a party plaintiff and several Class I railroads intervened as party defendants.

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[1] 332 I.C.C. 714.

In substance the plaintiff shippers contend that the ultimate findings of the Commission as to the need for increased railroad revenue were not based upon adequate subsidiary findings and were not supported by substantial evidence on the record since the Commission failed to determine,

> "how much revenue the railroads would need: (1) for operating expenses, rents and taxes; (2) for capital improvements including (a) the revenues needed to pay for improvements to be financed by internally generated funds, and (b) the additional revenues needed to enable them to obtain the funds required for externally financed improvements; and (3) the amounts needed for debt service and dividends. It should also have looked at and determined the railroads' future needs and not simply their present requirements."[2]

The plaintiffs further contend that the Commission ignored the differences in the financial needs of the railroads in the three railroad districts and failed to require the railroads to present evidence of the unit cost of performing transportation services.

The intervening Secretary of Agriculture argued that the Commission did not hold the railroads to the recently announced new standard of proof which it had expressed in *Ex Parte No. 256, Increased Freight Rates, 1967*,[3] and further that the Commission did not consider the effect of the rate increases upon the movement of traffic.

The defendant railroads submitted that the orders of the Commission, being permissive general increase orders, were non-reviewable, relying on *Algoma Coal and Coke Co. v. United States*.[4] They further submitted that even if the

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[2] Plfs. Brief p. 18.

[3] 332 I.C.C. 285.

[4] 11 F. Supp. 487 (E.D. Va. 1935) (hereinafter referred to as *Algoma)* and related cases, *infra.*

orders were held to be reviewable, the I.C.C. had observed the required statutory standards and the orders of the Commission had contained adequate findings supported by substantial evidence.

The I.C.C. did not join in the jurisdictional objection proffered by the railroads but chose to defend its action on the merits, contending that it had made the requisite findings which were supported by substantial evidence.

The Court concludes that it lacks jurisdiction to review the questioned Commission orders, and that it is unnecessary, therefore, to reach the issues raised by the plaintiff shippers and the intervening Secretary of Agriculture.

It is to be noted that the rates which have become effective under the I.C.C. orders are permissive and not mandatory, and that the Commission in its Ultimate Conclusions and Findings in *Ex Parte 259* declared in No. 15:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act." 332 I.C.C. 792.

The foregoing declaration assures any aggrieved party, such as the plaintiffs herein, the opportunity to challenge any particular rates which affect them under the procedures provided in Section 13 of the I.C.C. Act, 49 U.S.C.A. §13.

Under such circumstances it is the Court's opinion that this case should be governed by *Algoma*.[5] In that case District Judge Chesnut, writing for a three-judge court,[6] noted:

> "The position taken by the plaintiffs seems to misconceive the real nature and effect of the Commission proceeding. They take the view that what the Commission did in effect was to determine what would be just and reasonable rates for particular traffic transported by particular railroads, on insufficient findings of fact.
>
> * * * * * *
>
> "[T]his misconceives what the Commission did. It *prescribed* no particular rates. It merely permitted the carriers to file new rates without suspension. It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under section 13 (48 USCA § 13). That is to say, the increased rates now complained of are *carrier made* rates and not *Commission* made rates."

The factual and legal questions considered in *Algoma* are identical with those raised in the present proceeding; and, in the opinion of the Court, *Algoma* represents the applicable law.[7]

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[5] *Supra* Note 4, 11 F. Supp. at 493-494.

[6] Circuit Judge Soper and District Judge Way sat with Judge Chesnut.

[7] *Algoma's* position that the court will not entertain a suit to enjoin the Commission's orders in a general revenue proceeding where section 13's remedy has not yet been exhausted has been followed in *Koppers Co. v. United States*, 132 F. Supp. 159 (W.D. Pa. 1955); *Florida Citrus Commission v. United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd*, 352 U.S. 1021 (1957); *Atlantic City Electric Co. v. United States*, S.D. N.Y., ___ F. Supp. ___ (No. 69 Civ. 800, October 28, 1969).

Accordingly, the complaint is dismissed.

/s/ Edward A. Tamm
Edward A. Tamm, Circuit Judge

/s/ Howard F. Corcoran
Howard F. Corcoran, District Judge

Wright, Circuit Judge, dissenting: It is improper, in my judgment, to dismiss this suit at this time. Instead, I think we ought to examine the order now and decide whether the Commission's action was supported by substantial evidence. I am in complete agreement with the proposition that any plaintiff who wants to challenge any rate now being charged must first pursue his administrative remedies under Sections 13 and 15 of the Act. However, the plaintiffs here are not seeking to challenge the appropriateness of any rate or combination of rates. Instead, they wish to challenge the propriety of a Commission order which allowed the rates generally to be raised by the carriers. That order was predicated on a factual determination by the Commission that the nation's railroads need more freight revenue. That order, like any action of the Commission, must be based on substantial evidence. *Cf. United States v. Louisiana*, 290 U.S. 70, 77 (1933). Such an order is, of course, judicially reviewable. 28 U.S.C. §§ 1336, 2325 (1964), and I feel it is ripe for review now.

There can be no doubt that there are plaintiffs who are aggrieved now by this order. The effect of the order was to remove the upper limits on rates which the Commission had prescribed for certain commodities. Without this order, the railroads could not have increased any of the Commission-made rates. Shippers, therefore, are paying higher rates now as a direct result of this Commission determination. *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

Considering challenges to the general order now would avoid needless relitigation of the same issue before the Commission in countless rate-making proceedings involving

individual commodities. Furthermore, I think that it would be difficult if not impossible for any shipper to challenge this determination of a nationwide railroad need for revenue in the context of an individual rate-making proceeding. This is the sort of threshold issue which ought to be determined once and for all at the outset; preferably, as plaintiffs here seek to do, in a class action.

I admit that there is little direct language in the existing cases supporting judicial review of the order now. Review now does seem eminently sensible to me, however, in spite of the fact that *Atlantic City*[1] seems to preclude it. Furthermore, both the *Algoma*[2] and the *Florida Citrus*[3] cases can be read as sanctioning this limited, threshold review. After holding that the plaintiffs could not challenge individual carrier-set rates until they were passed upon by the Commission, both courts did consider the propriety of the general order entered by the Commission. Both concluded that the general order was supported by substantial evi-

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[1] *Atlantic City Electric Co. v. United States*, S.D. N.Y., ___ F. Supp. ___ (No. 69 Civ. 800, October 28, 1969).

[2] *Algoma Coal & Coke Co. v. United States*, E.D. Va., 11 F. Supp. 487, 494-495 (1935).

[3] *Florida Citrus Comm'n v. United States*, N.D. Fla., 144 F. Supp. 517, 524-527 (1956), *affirmed*, 352 U.S. 1021 (1957).

dence. Consequently, neither of these cases, in my judgment, supports the disposition made here or in *Atlantic City*.[4]

I respectfully dissent.

/s/J. Skelly Wright
J. Skelly Wright, Circuit Judge

Dated Dec. 3, 1969

[4] It is not inconsistent to hold that individual rates must be first challenged before the Commission, but at the same time to permit judicial review of the propriety of the general order. Two different determinations are made by the Commission. In the first proceeding, which leads to the general order permitting the carriers to raise rates, the Commission determines that the railroads need more revenue. That order will stand if the court finds that it is based on substantial evidence. *Florida Citrus Comm'n v. United States*, *supra* Note 3, 144 F. Supp. at 524-527; *Algoma Coal & Coke Co. v. United States*, *supra* Note 2, 11 F. Supp. at 494-495. In the second proceeding, the Commission has to determine the reasonableness of individual rates. That determination, too, is subject to judicial scrutiny. 28 U.S.C. § 1336 (1964); *see Swift & Co. v. United States*, 343 U.S. 373 (1952).

APP B

30432

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968

Decided November 25, 1968

1. After hearing and consideration of briefs, found that the Nation's railroads are in immediate need of increased freight revenue to offset rising operating costs.
2. As interim relief, order entered June 19, 1968, suspending tariff schedules, vacated in part.
3. Investigation of all proposed increases in rates and charges continued.
4. Appropriate order entered, including modification of our outstanding orders and fourth-section relief.

Andrew C. Armstrong, Curtis H. Berg, John J. Burchell, Charles W. Burkett, Martin L. Cassell, Charles W. Chapman, J. T. Clark, Charles H. Clay, Monroe E. Clinton, John A. Daily, J. R. Davis, J. H. Doeringer, Paul R. Duke, Stuart F. Gassner, Edward R. Gustafson, John W. Hanifin, Louis A. Harris, W. P. Higgins, James L. Howe III, E. E. Hunt, Harvey Huston, Edward A. Kaier, W. A. Kimbrough, Jr., W. Bruce Kopper, A. W. Laisy, R. J. Lally, Ralph L. Lanigan, Harry B. LaTourette, Don McDevitt, John D. Morrison, Robert C. Morton, Richard J. Murphy, J. J. Nagle, Milton E. Nelson, Jr., W. J. O'Brien, Prime F. Osborn, C. Harold Peterson, C. A. Prior, John F. Reilly, Charles C. Rettberg, Jr., Albert B. Russ, Jr., R. J. Schreiber, Preston C. Shannon, R. D. Sickler, John F. Smith, J. M. Souby, Jr., R. H. Stahlheber, Richard H. Strodel, James A. Tapley, D. M. Tolmie, L. E. Torinus, Jr., W. G. Treanor, M. R. Warnock, J. C. Waterman, John E. Weiss, and *Robert J. Williams* for respondents.

Charles H. Gilbert, E. F. Heitz, William A. Imhof, James H. Lauth, Charles M. Pearson, Leon Schill, and *Ronald P. Vail* for the Secretary of Agriculture.

Ralph L. Trisko and *Pedro R. Vazquez* for the Department of Commerce.

Dellon Coker for the Department of Defense.

Murray Chais for the Atomic Energy Commission.

Leonard M. Shinn for General Services Administration, Department of Defense, and other government agencies.

Robert F. Lenzi for General Services Administration.

James M. Henderson for the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, New Jersey, Delaware, Maryland, Pennsylvania, and Virginia and other Virginia interests.

Robert A. Lane for the State of California and the California Public Utilities Commission.

Hector Anninos, Robert A. Lane, and *Mary Moran Pajalich* for the California Public Utilities Commission.

John I. Finsness for the Kansas State Corporation Commission, South Dakota Public Utilities Commission, North Dakota Public Service Commission, Montana Board of Railroad Commissioners, Minnesota Department of Public Service, Nebraska State Railway Commission, and the Wyoming Public Service Commission.

Maynard C. Dolloff and *Frank D. Reed* for the Maine Department of Agriculture.

John L. Crothers, Jr. for the Maryland State Board of Agriculture.

Jerome E. Pederson for the Minnesota Public Service Commission.

C. Lowell Purdy for the Montana Commissioner of Agriculture.

Gordon E. Ganka for the Nebraska State Railway Commission.

Robert L. Christensen for the New Hampshire Department of Agriculture.

Phillip Alampi for the New Jersey Department of Agriculture.

Louis J. Lefkowitz, Walter J. Maskowski, and *Dunton F. Tynan* for the State of New York.

D. M. Dalrymple for the New York State Department of Agriculture and Markets.

John M. Agrey for the North Dakota Public Service Commission.

Charles O. Ham, Jr. for the State of Oklahoma Corporation Commission.

Thomas W. Dench, Sam R. Haley, and *James E. Singleton* for the Public Utility Commissioner of Oregon.

Leland H. Bull for the Pennsylvania Department of Agriculture.

Eugene P. Springer for the South Dakota Public Utilities Commission.

Maurice B. Rowe for the Virginia Department of Agriculture and Commerce.

Arthur W. Jacocks for the Virginia State Ports Authority.

William R. Brumfield and *Harold C. Heublein* for the Wisconsin Public Service Commission.

Karl E. Bakke, Michael Bradfield, Walter Hollis, George D. Krumbhaar, Jr., W. Patrick Morris, John B. Rehm, Fred B. Smith, Pedro

R. Vazquez, Edward Weinberg, John Geoffrey Will, and *Bruce Wright* for the Federal Interagency Committee on Coal Exports.

William B. Adams, Stanley W. Akers, V. Alexander, W. P. Allen, Jr., Eugene D. Anderson, Gordon R. Anderson, William C. Andrews, John J. Archer, Arthur A. Arsham, Robert C. Bachelder, William L. Bailes, Jr., Robert L. Banks, Howard J. Benson, Klaus Bergman, James E. Bilbo, Jacob P. Billig, Douglas W. Binns, Richard B. Blackwell, Calvin L. Blaine, Chas. E. Blaine, Robert A. Blocki, R. F. Bohman, Sr., George H. Borts, Harold A. Bowron, Jr., J. Robert Bray, Edward K. Brenner, Jerry H. Brenner, Charles A. Brock, Charles T. Brookman, Frank C. Brooks, Carman E. Brown, Charles L. Bucy, Robert S. Burk, John H. Caldwell, Donald J. Carlson, William L. Carter, Bernard B. Caruso, Richard A. Chrz, J. Raymond Clark, John M. Cleary, M. J. Cloughesy, Garth Coffin, Albert Cohen, Clyde Comstock, C. D. Coppinger, D. H. Core, Jr., Leon Coslov, Richard E. Costello, Leslie M. Cox, Richard Crabtree, Fred S. Crittenden, D. P. Cromwell, Norman L. Cummins, F. P. Daleiden, Wilma M. Dalton, A. P. Davis, Jr., M. J. Davis, J. Douglas Dawson, William D. Day, Samuel F. Delisi, Edward J. Dempsey, Ray B. Dewey, James A. Diehl, Norman E. Dietrich, C. R. Dollinger, Sr., John Dollinger, Jr., John F. Donelan, Fred C. Doutel, James L. Downs, George B. Dutton, Jr., Samuel W. Earnshaw, Milton K. Eckert, Harry Eggert, Scott H. Elder, Vernon L. Everngam, Ernest Falk, Glen L. Fast, Gerald W. Fauth, Jr., W. E. Fincher, A. William Finke, R. C. Flesch, Robert H. Foltz, Charles F. Forgue, Max G. Fortune, Max E. Foster, Edward B. Frankel, Samuel R. Freeman, Alfred E. Froh, Richard W. Gaudern, F. E. George, John W. Gilius, Kenneth L. Gillis, Irving R. Glass, Richard Gordon, Robert H. Gorske, Howard Gould, J. L. Guthrie, George F. Hall, G. Robert Hallett, Jr., Roy Hancock, T. Vernon Hansen, Richard J. Hardy, Robert E. Harridge, Richard Harrington, Louis B. Hartlage, Leo P. Hearn, George A. Heitz, R. J. Helm, James M. Henderson, Joseph W. Hepburn, Raymond M. Hilbert, Walter Hoffman, Brian Holtz, John L. Hopkins III, O. Denton Hudson, Bernard Hulkower, John Hummel, Joseph A. Illes, James J. Irlandi, James M. Jones, Jr., N. J. Jordan, S. Harrison Kahn, R. E. Kanauss, William Q. Keenan, Leo J. Kelleher, Jr., Charles A. Kelly, Daniel J. Kennedy, John A. Kennedy, Jr., John J. Kerr, Robert Kharasch, L. O. Kimberly, Jr., Fred M. Kimbrough, Wade Kimsey, Edward S. Kirby, T. B. Kircher, Alan M. Kirk, Robert M. Koch, Dwight L. Koerber, David A. Kosh, James S. Laird, John F. Lane, Carl J. Lessing, Robert Levin, Arnold Levy, William M. Lewis, Jr., Robert C. Liebenow,

Eugene T. Liipfert, William J. Lippman, Dickson R. Loos, Frank Loughran, Gordon P. MacDougall, William M. Maddox, Nate Magid, L. D. Mangan, Edwin E. Marsh, Sheila H. Marshall, Lauman Martin, Phillip A. Martin, C. L. Mayfield, Charles J. McCarthy, Don McDevitt, Graham W. McGowan, Thomas F. McGrath, C. McIntosh, Kathleen C. McManus, R. W. Meckfessel, Charles M. Meehan, Henry P. Megargee, Jr., Joseph M. Michaels, G. G. Miller, John L. Miller, Reeder C. Miller, S. H. Moerman, Marvin H. Morse, James F. Mulligan, John C. Mundt, George H. Nafziger, Alfred J. Navaroli, Robert M. Neary, Wesley C. Newman, J. H. Norton, Allen J. O'Brien, Lawrence J. O'Connor, C. V. O'Hern, Jr., James J. O'Malley, Jr., Samuel Omasta, Richard G. Olson, D. J. Osbjornson, L. A. Parish, John T. Parkinson, Gilbert J. Parr, J. D. Patterson, Leroy E. Peabody, Jr., Richard H. Pennell, Robert R. Pester, John S. Peters, John W. Peterson, Leonard E. Peterson, M. G. Peterson, E. H. Pierson, Harold M. Pockrose, Frank E. Polom, K. M. Potter, Roy B. Powell, M. T. Power, Harry D. Pugsley, Francis P. Pusateri, T. A. Quintrell, Clarence R. Reed, Lawrence A. Reedquist, Joseph V. Regan, David Reichert, Arthur M. Ribe, Charles H. Rice, Jack E. Richert, E. V. Robinson, Jr., Alfred A. Rochester, O. H. Roehling, Allan A. Rubin, James A. Ruffalo, Henri F. Rush, Jr., Charles Rust, William A. Ryan, John R. Scanlan, L. Schaffel, Robert M. Scott, Durward Seats, Herbert W. Sears, S. L. Seftenberg, Ashley Sellers, John L. Shissler, Jr., F. L. Siglah, Jerome H. Simonds, Clarence E. Sims, Charles W. Singer, William L. Slover, Charles F. Smith, Darrell H. Smith, Jr., E. R. Smith, Milton H. Smith, William K. Smith, William U. Smith, Wilson W. Snyder, William P. Spencer, John C. Spythalski, Charles W. Stadell, John R. Steuteville, Oliver L. Stewart, Tyrus C. Stewart, Nelson A. Stitt, T. M. Storer, William S. Story, Martin F. Strate, Elmer F. Streib, Charles O. Strickler, W. J. Sullivan, Daniel J. Sweeney, J. L. Tompkins, William H. Towle, Matthew L. Triggs, Thomas H. Truitt, Benjamin Trumbull, Jack R. Turney, Jr., Harry P. Vaughan, Clinton H. Vescelius, C. H. Wager, H. F. Wagner, Van B. Wake, J. F. Wallace, John A. Ward, Richard G. Warren, C. C. Warwick, Paul P. Watkins, M. R. Watson, Everett A. Weathers, E. Jerome Webster, Jr., Ben Weiner, George B. Weir, M. W. Wells, M. W. Wells, Jr., Robert R. Wertz, J. S. White, Jr., Henry M. Wick, Jr., Harley W. Williams, Arthur L. Winn, Jr., Louis H. Winnard, George Thomas Wright, Joseph W. H. Wright, and *Charles H. Wulff* for protestants.

INTERIM REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding concerns comprehensive increases in freight rates and charges proposed by the railroads to offset rising operating costs. The last permanent general increase was permitted in Ex Parte No. 256, *Increased Freight Rates, 1967*, 329 I.C.C. 854; 332 I.C.C. 280. On March 7, 1968, approximately 1 month after the final report in that proceeding was issued, substantially all of the class I railroads of the United States and some railroads of other classifications, for themselves and on behalf of certain water and motor carriers, filed a petition for authority to depart from the rules governing tariff publication to permit the proposed increases to be published and filed in a short form, which was granted. The petitioners also sought modification of outstanding rate orders, authority to depart from section 4 of the Interstate Commerce Act, and all other relief that might be necessary to permit the proposed increases to become effective without suspension.

Increased rate proposal.—On March 11, 1968, the railroads filed their master increase tariff, X-259, containing the schedules of proposed increases in freight rates and charges.[1] Originally published to become effective on May 27, 1968, this date was subsequently voluntarily postponed to June 24, 1968. The proposed increases range generally from 3 to 10 percent and for the most part they are 6 percent or less. As in prior proceedings, a special refund provision is included which will have application in situations where no increase or something less than the full increase proposed is authorized in this proceeding.

Proceedings through June 19, 1968.—Pursuant to the special rules of procedure set forth in our order of March 12, 1968, verified statements (affidavits) were submitted by the railroads in support of the proposed increases, and by protestants in opposition thereto; and opposition was also registered by protests filed in accordance with our General Rules of Practice. At that stage the principal question was whether the increase tariff schedules should be suspended, in whole or in part, pending an investigation into their lawfulness. Briefs directed to this issue were filed by the parties; and on June 13-14, 1968, we heard oral argument.

[1] Most of the increases being considered herein are set forth in the master tariff X-259, as amended; however, some of the provisions, such as restrictions on the application of the master tariff, are contained in agency or individual carriers' rate tariffs.

Since the petitioners intend to make like increases in their rates and charges on intrastate traffic, we notified the several States of the pendency of the proceeding; and, pursuant to section 13(3) of the act, representatives of four State commissions, the Honorable Ralph H. Wickberg of Idaho, the Honorable Charles J. Fain of Missouri, the Honorable Vernon B. Derrickson of Delaware, and the Honorable Edward L. Mason of Florida, sat with us throughout the oral argument. We have had the benefit of their counsel, both at that time and in connection with the conclusions reached herein.

Upon careful consideration of the matters presented by the parties, we concluded to suspend the proposed increases to the extent that they exceeded 3 percent. By order entered June 19, 1968, the proposed increases were suspended until January 24, 1969; but the respondents were permitted, on not less than 1 day's notice, to increase their rates not to exceed 3 percent (except for the disposition of fractions) subject to maximums no higher than those suspended and in no event to produce a greater revenue than that proposed in the X-259 tariff. The order also instituted an investigation of the proposed and the permissive increases. The respondents then filed a master increase tariff, "X-259-A," establishing the increases authorized in the order of June 19, 1968, which tariff became effective June 24, 1968.

Investigation proceedings.—The investigation was conducted under the special rules of procedure set forth in our order entered July 3, 1968. For the purpose of receiving evidence and argument with respect thereto we assigned the following sub-numbers to the tariff schedules and issues involved herein:

Sub-No. 2, railroad cost and revenue need;

Sub-No. 3, coal, tariff items 1065, 1070, 1075, 1080, 1085; 1090, 1095, 1100;

Sub-No. 4, iron and steel scrap, pig iron, iron ore, tariff items 845, 1060;

Sub-No. 5, grain, sugar beets and cane, sugar, molasses, flour, coffee, bakery products, tariff items 515, 520, 525, 560, 570, 580, 675, 680;

Sub-No. 6, accessorial charges, line haul, minimum charges, absorption, transit, tariff items 100, 110, 115, 130, 150, 155, 160, 165, 170, 180;

Sub-No. 7, woodpulp, pulpwood, textile and paper waste, paper, lumber, cotton, textiles, apparel, synthetic fibers, wool, tariff items 500, 505, 510, 690, 695, 700, 705, 710, 715, 720, 725, 900, 925, 970;

Sub-No. 8, farm products, fruits, nuts, meat, canned goods, dairy products, poultry and eggs, starch tapioca, tallow, liquor, tobacco, hides, tariff items 530, 535, 540, 545, 550, 555, 565, 575, 585, 590, 595, 600, 685, 910, 915, 920, 935, 940;

Sub-No. 9, fertilizer, aggregates, limestone, sand, asphalt, potash, shells, cement, brick, clay, lime, chemicals, gases, petroleum products, acids, pulp

mill byproducts, paint, drugs, soap, latex, tires, tariff items 605, 610, 625, 630, 635, 640, 645, 655, 660, 730, 740, 745, 750, 755, 760, 765, 770, 775, 780, 785, 790, 795, 800, 805, 810, 815, 820, 825, 830, 835, 950, 975, 980, 985, 990, 1020 (shells);

Sub-No. 10, miscellaneous ores, metal products, batteries, nonferrous scrap, salt, radioactive materials, sulphur, phosphates, tariff items 615, 620, 650, 665, 670, 735, 840, 865, 1000; and

Sub-No. 11, metal castings, iron and steel products, pipe, machinery, household appliances, vehicles, instruments and parts, furniture, fixtures, tiles, miscellaneous manufactured items, guns, ammunition, glass, abrasives, marine products, et cetera, tariff items 850, 855, 860, 870, 875, 880, 885, 890, 895, 905, 930, 945, 955, 960, 965, 995, 1005, 1010, 1015, 1020 (except shells), 1025, 1030, 1035, 1040, 1045, 1050, 1055.

Four hearing examiners were assigned to conduct hearings, which were held in Washington, D. C., starting September 9, 1968, and concluding October 8, 1968. The hearings were devoted mainly to cross-examination of respondents' witnesses and the introduction of some rebuttal evidence. Briefs directed to respondents' cost and revenue need and to the lawfulness of the tariff schedules under investigation were filed on or before November 12, 1968. As stated in our order of July 3, 1968, and as contemplated in section 15(7) of the act, this proceeding will not be the subject of an examiner's report and recommended order because due and timely execution of our functions requires an expedited decision. In this interim report we shall deal primarily, but not exclusively, with respondents' cost and revenue needs, which were the subject of the Sub-No. 2 hearing.

Petition to vacate suspension.—The Sub-No. 2 hearing started September 9, 1968, and concluded September 25, 1968. On the following day, by appropriate petition, respondents requested that we vacate our order of June 19, 1968, insofar as it suspended the proposed increase schedules, and that we permit those increases to become effective without further delay, but subject to the aforementioned refund provision. Numerous protestants, in replies to that petition filed on or before October 16, 1968, urged that it be denied. Several of them, referring to the general brief date of November 12, 1968, asked that action on the petition be deferred, in any event, until we have had opportunity to study the briefs and the record in the complete proceeding; and this we have done. Our conclusion herein, that respondents are in need of immediate relief, is based upon the entire record, including the evidence and briefs of the parties as well as the described petition and the replies thereto.

Preliminary rulings.— One of the above-mentioned replies, filed by the Coal Exporters Association of the United States, Inc., also contained a prayer for affirmative relief, in the form of a motion to cancel the interim X-259-A increase of 3 percent on coal destined for export as authorized by our order of June 19, 1968, and seeking also an order for refund of charges arising pursuant to that increase. Rule 101(e) of the Commission's General Rules of Practice (49 CFR 1100.101(e)) provides that a petition seeking any change in an order of the Commission must be filed within 30 days after the date of service of the order except for good cause shown and upon leave granted. The motion referred to, which was refiled October 21, 1968, does not comply with the rule and may not be considered.

Several protestants renew on brief their objections to certain rulings of the examiner, near the close of the Sub-No. 2 hearing, in regard to a pamphlet published by Hayden, Stone, Incorporated, members of the New York Stock Exchange, entitled "Railroad Industry Review 1968," dated August 27, 1968. Although not disclosed of record, the review was apparently prepared for Hayden, Stone by or under the direction of two financial analysts, Pierre R. Bretey and Karl Ziebarth. The examiner refused to have the pamphlet marked for identification or to receive it in evidence as a rebuttal exhibit of counsel. The examiner further refused to issue a subpoena to compel Mr. Bretey to appear and testify. Over the objection of respondents, the examiner allowed protestants to make an offer of proof as to the testimony they expected to adduce through Mr. Bretey. Referring to the pamphlet, protestants' counsel stated:

> This represents the information which is going out to the purchasers of railroad stock. I think this exhibit—or this document is entitled to be admitted simply as showing the attitude of the financial community toward railroad stocks. It has a bearing on whether railroad stocks are or are not accepted by the financial community.

Nowhere is it asserted that Mr. Bretey and his co-author are themselves investors, as distinguished from analysts and advisors to investors. Nor do we have any assurance that Mr. Bretey was the author of the portions of the pamphlet sought to be introduced. Arguing for the admissibility of such "rebuttal evidence," counsel for protestants referred to an explanatory letter sent by the Chairman on August 15, 1968, to all parties of record, and specifically to the following sentence:

Nor do the proceedings prohibit the presentation of rebuttal evidence by any party under circumstances where in the judgment of the presiding examiner such evidence is appropriate and in rebuttal of new matter.

We have examined the transcript of the proceedings in this connection and find no error in the rulings of the examiner. We concur in his judgment that the proffered evidence was not "appropriate and in rebuttal of new matter." We note that some of the protestants' briefs and replies to respondents' petition to vacate the suspension contain extended quotations from and numerous references to the pamphlet in question as if the factual assertions therein were competently established of record. These quotations and references are not entitled to consideration and they are stricken.

Increased operating costs.—In our reports in Ex Parte No. 256, *supra*, we reviewed the wage settlements and other cost increases experienced by the railroads since the previous general freight rate increase authorized in Ex Parte No. 223, *Increased Freight Rates*, 1960, 311 I.C.C. 373. As explained in our final report in Ex Parte No. 256, the cost totals alone are not meaningful except in relation to the volume of transportation performed. Accordingly, respondents in this proceeding have computed their unit operating costs by years, starting with 1961; and these are shown, together with comparable revenue data in appendix A hereto. We have checked these data and find them substantially accurate. Gross ton-miles reflect the total number of units of transportation produced and are therefore the most appropriate comprehensive measure of output for this purpose. Total operating expenses (including rents and taxes other than Federal income taxes) per 1,000 gross ton-miles actually decreased from $5.95 in 1961 to $5.58 in 1966, and then turned upward to $5.85 in 1967, an estimated $5.96 in 1968, and $6.05 for the constructive year. The unit-cost level for the constructive year is 8.42 percent above that for 1966. Respondents' constructive year projections are based on their estimated 1968 level of traffic demand (744,203 million revenue ton-miles and 12,792 million revenue passenger-miles) and second-half 1968 wage rates, material prices, and other cost factors in effect for a full 12 months.

Current wage increases, above those submitted by respondents in Ex Parte No. 256, but effective in 1967, include an additional 1 percent for engineers, conductors, shopcrafts, and train dispatchers; an additional 6 percent for engineers working without

firemen; increased car scales for road conductors; and 10 cents per hour for journeymen and mechanics. Further wage increases became effective in 1968, as follows: January 1, 4.3 percent for train dispatchers and 2.5 percent for other nonoperating employees, trainmen, and firemen; April 1, and October 1, 5 cents per hour each for journeymen and mechanics; July 1, 3.5 percent for trainmen, firemen, and all nonoperating employees except shopcrafts, 5 percent for engineers, conductors, and shopcrafts, and 5 cents per hour for a special fund for clerks. These wage adjustments with increases in fringe benefits and payroll taxes are estimated by respondents, on an annualized basis, to aggregate $437.1 million. However, as shown in respondents' exhibits and explained by their principal witness, this total is not intended to represent the extent to which actual labor costs are expected to increase from 1 year to another. For such comparisons we are referred to respondents' condensed income accounts, in which the labor expenses are directly related to the employment level of each year and thus reflect the extent to which rising wage rates are offset by improved productivity.[2]

Respondents' income account tabulations for 1966, 1967, 1968 (partially estimated), and the constructive year (including the proposed increases) are reproduced in appendix B hereto. We have carefully checked these data and find them substantially accurate in all material respects.[3] The estimates for 1968 and for the constructive year are expanded from returns to questionnaires submitted by accounting, traffic, and other officers of 25 "test carriers" representing approximately 84 percent of all class I railroads in the United States, based on operating revenues. These test carriers constitute, for this purpose, a representative group for the industry as a whole.

This evidence compels the conclusion that the entire adjustment proposed by respondents, if approved and made effective, would fall far short of meeting respondents' revenue need due to increased operating costs. For this purpose, 1966 is adopted as a base year and compared with the constructive year, which embraces all known changes of record. Use of 1966 as a base year is reasonable, and fair to shippers, because it reflects recent experience not complicated by a major rate revision, and the traffic volume is close to the current level. As shown in table 1, below, respondents' operating expenses, rents, and taxes

[2] Compare Ex Parte No. 256, 332 I.C.C. 280, 283-288.

[3] Some relatively minor exceptions are discussed latter in this report.

(excluding Federal income taxes) in 1966 totaled $9,422.6 million. Adjusted by territories, as shown in appendix C hereto, for the small differences in the traffic level of the constructive year, these base-year operating costs become $9,331.5 million. For the constructive year, the corresponding figure is $10,132.6 million, reflecting an increase in operating costs of $801.1 million. To this must be added $54.3 million, which represents the increase in respondents' fixed charges and contingent interest. Thus, their need for additional freight revenue, to be derived from both Ex Parte No. 256 and Ex Parte No. 259, to cover their increased expenses, is approximately $855.4 million.

TABLE 1

Operating expenses, rents, taxes and fixed charges
(excluding Federal income taxes)

	1966	Constructive year	Increase	
		millions		
Operating expenses	$8,117.7	$ 8,594.0	-------	-----
Equipment and joint facility rents	522.8	649.2	-------	-----
Taxes	968.4	1,025.9	-------	-----
	9,608.9	10,269.1	-------	-----
Less Federal income taxes	186.3	186.5	-------	-----
Total operating expenses	9,422.6	----------	-------	-----
Adjusted for constructive year volume	9,331.5	10,132.6	$801.1	8.58%
Fixed charges and interest	463.5	517.8	54.3	-----
Total, expenses and charges	9,795.0	10,650.4	855.4	8.73%

It will be noted that the increase of 8.58 percent shown in table 1 is consistent with and confirms the increase in the unit-cost level previously referred to. With the inclusion of fixed charges, which have risen more rapidly than the other expense items, the increase above the 1966 cost level is 8.73 percent.

The Ex Parte No. 256 rate increases, at the constructive year traffic level, should be generating approximately $300 million in increased freight revenue, which leaves $555.4 million in increased expenses to be met by the Ex Parte No. 259 increases in rates and charges. Respondents estimate that the 3-percent interim increase authorized by our order of June 19, 1968, will produce $265 million in annual revenue and that, if all of their proposed increases become effective, they will produce some $200 million in additional revenue, or an aggregate of $466.2 million. Protestants' attack on this estimate is not that it is understated but that, because the rate increases tend to cause diversion of traffic, the total revenue generated will be somewhat less. Approval of the entire rate adjustment would thus leave respondents short by at least $89.2 million of annual revenue needed simply to cover their increased expenses.

In the foregoing discussion we have given no consideration to the claim that respondents' revenues from passenger, mail, express, and "all other" services will have declined since 1966 by about $300 million, nor to the time lag usually experienced in establishing like increases on intrastate freight traffic.[4]

Conclusion as to immediate revenue need.— We conclude that respondents are in immediate need of additional freight revenue to offset, in part, their increased operating expenses, including fixed charges and contingent interest, and that our order of June 19, 1968, insofar as it suspended the operation of the proposal increase schedules, except in the limited respects hereinafter discussed, should be vacated.

Rate of return.— Since, as already indicated, our present decision rests upon other grounds, we shall not dwell at length upon respondents' rate of return and net investment. However, in view of the attention devoted to these subjects in the briefs, we deem it appropriate to clarify the situation in certain respects.

In keeping with their practice in prior general revenue proceedings, respondents submitted an orthodox cost-of-capital study through a qualified expert witness, who concluded that, on respondents' net investment as determined by the Commission, a reasonable rate of return would be 9 or 9 1/2 percent. It being apparent

[4] Cf. *Increased Freight Rates, Hawaii, Territories*, 1956, 299 I.C.C. 429, 436.

that respondents could not possibly achieve such a rate of return at the level of rates here proposed, the presiding examiner inquired whether the recommended rate of return was not, for all practical purposes in this proceeding, an academic concept. The answer, quoted in part in one of the briefs, was as follows:

> Well, I would say it is with reference to your need for computing the total revenues that you think the railroads ought to have. In that sense it is. But it is not an academic concept for the purpose of comparing what the railroads are actually earning compared to what would be fair in making your determination whether any given set of rates is fair and reasonable.

The first part of the witness' answer comports with our observation in Ex Parte No. 206, *Increased Freight Rates, E., W., and S. Territories, 1956*, 300 I.C.C. 633, 662, " * * * that there is no statutory requirement or statement of policy requiring the making of rates to yield a certain rate of return on investment either in the United States as a whole, or in the various rate territories." In other words, as argued on brief by several protestants, rate of return is not a statutory standard. We agree.

The second part of the witness' answer relates to the zone of reasonableness. In the event that the revenue at a given rate level were to yield a rate of return in excess of 9 1/2 percent, such a rate level, presumably, would not be just and reasonable to the public. The converse, however, is not necessarily true; a rate of return of 9 percent or less does not automatically place the rate level in the zone of reasonableness; but a rate of return in the range of 4 percent or less, which we have repeatedly characterized as substandard, is at least an indication that the underlying rate level is within the zone of reasonableness.

As calculated by respondents on the same basis as in previous cases, their rates of return, by districts and for the United States, in recent years and for the constructive year (with the proposed increases), are as shown in table 2, below; and they are clearly inadequate.

TABLE 2

Rates of return on net investment

	1966	1967	1968*	Constructive year*
		(percent)		
Eastern District	3.55	1.58	1.77	2.37
Southern District	4.45	3.56	3.65	4.36
Western District	4.03	2.75	2.93	3.35
United States	3.90	2.45	2.59	3.12

*Estimated

Some criticism is leveled at the above rates of return because some railroads have included, in their charges against net railway operating income, Federal income taxes on income from nonrailroad sources. In Ex Parte No. 206, *supra*, at 656, we said in regard to a similar contention:

> We agree with protestants that this sum should not be included in computing net railway operating income for purposes of determining a rate of return. However, the percentage relation which this amount bears to the total value of property used in common carrier service is so small that it would have only a very slight effect upon the rate of return.

Examination of the income accounts for those railroads which in 1967 had the largest amounts of nonoperating income discloses that the indicated correction of their reports would result in raising the rates of return in table 2 by not more than 0.01 percent. The criticism is valid but not of significant importance in this proceeding.

Net investment.—Some of the protestants contend that respondents' net investment is overstated, and that if it were reduced, obviously; the calculated rates of return would be more favorable.

We agree, as a matter of principle, with protestants' contention that the balances in account 80, Other Elements of Investment, and account 90, Construction Work in Progress, should be excluded from respondents' net investment for purposes of calculating their rate of return. Prior to 1963, bases for determining the rates of return for railroads were prepared from valuation records maintained by the Commission. These records reflected the original cost of carrier property as found for valuation purposes, appropriately corrected for additions and retirements as reported by the carriers in their annual reports of property changes. During the years that the Commission maintained these records, the cost of construction work in progress was not included as carrier operating property, such cost being allowable only after such property was actually dedicated to public service. See *Illinois Central R. Co.*, 46 Val. Rep. 1, 39-40. By order entered April 17, 1963, we required the railroads to record in their property accounts the original cost balances contained in the Commission's valuation records. The resulting differences, debit or credit, were recorded in account 80, a new account established for that purpose. At the same time there was established a new account (90) for construction work in progress. Accordingly, the two accounts represent (1) unsupportable items not includible in cost of property,

and (2) costs applicable to items of property not in transportation service at date of financial statement. In the circumstances, carriers are not entitled to a return on such amounts; consequently, the balances in these two accounts should be excluded. The effect of these corrections would be to raise the rates of return shown in table 2 by not more than 0.05 percent.

Various additional contentions of protestants regarding respondents' net investments have been examined and found to be without substance. Some of those most vigorously urged are restated below with our comments.

(1) *Contention.*—That land values and improvements in place in 1916 were inventoried at the 1910-1914 reproduction cost which was used as a beginning point for the current investment in railroad property, thereby overstating the net investment by the increased values of land and properties accruing between 1840 and 1914.

Comment.— In determining the valuation of railroads, it was found that the average prices that prevailed between 1910 and 1914 for other than land, represented, by and large, the average reproduction cost of railroads; and, in the absence of actual cost which was undeterminable, this index was applied as a beginning base for what later became known as "original cost" of railroad property, other than land. This base was perpetuated through separate reporting requirements until 1963, when, as above explained, we required the railroads to adopt the original cost balances as carried by the Commission in their investment accounts, with the differences, if any, being recorded in the new account 80. Additionally, over the years approximately 70 percent of the "original cost dollars" that was established to represent the cost of the railroad property at the date of basic valuations has been written off as a result of retirements of such property. Consequently, this large percentage of estimated original cost has been replaced by the *actual* cost of property which has been added subsequent to the date of basic valuations. The appraised value of land was never placed on the railroads' books but was used as part of the rate base in Commission proceedings prior to the year 1964. Upon adjustment of the railroad accounts as aforementioned, the railroads were required to place in their land account the actual cost of land, estimated in part. Such actual cost is used as part of the net investment in the instant proceeding.

(2) *Contention.*—That, for many years after the Commission's valuation of properties, many railroads capitalized maintenance expenses, thus further inflating the investment base.

Comment.— There is no responsible basis for such an allegation. Our prescribed accounting rules specifically prohibit the capitalization of expenses. Furthermore, subsequent to the valuation of railroad properties the Commission maintained a large force of valuation field auditors that closely scrutinized railroad property records for proper recording of all additions and betterments; and this procedure is still followed in connection with our current examinations of railroad accounts and records.

(3) *Contention.*—That until 1943 the railroads were not required to record depreciation for road property, thereby contributing to the inflation of the present net investment.

Comment.— While it is true that railroads were not required to record depreciation for road property until 1943 there are offsetting factors that should be considered in evaluating the adequacy of the accrued depreciation for road property; and, on balance, we do not believe that the present net investments are overstated for the reason indicated. There is, of course, no question whatsoever as to the adequacy of the depreciation reserves for equipment accounts.[5] In this connection, among other things, consideration has been given to the following:

(a) Many railroads have gone through reorganization. In each instance, when approving the opening entries for the reorganized railroad, we have required the railroad to establish a depreciation reserve considered adequate at the time for past accrued depreciation on road property.

(b) When railroads' accounts were adjusted in 1963 to record the "original cost" of property in their primary accounts, in instances when the adjustment created a credit balance in account 80, we permitted the railroads, upon application, to transfer an appropriate portion of such credit balance to depreciation reserve accounts for road property to the extent necessary to offset any underaccruals as at that time.

(c) Depreciation accounting is not prescribed for the "track structure" which includes crossties, rails, track material, ballast, and labor. The use of "betterment" accounting for rail results in the investment account balance showing a far lesser amount

[5] Cf. *Increased Freight Rates, E., W., and S. Territories, 1956, supra*, at 656-657.

(probably as much as 50 percent) than the actual cost of the rail that is in the track structure today. Crossties, in the carriers' accounts, have remained static in the amount that was recorded per tie at time of the initial valuation. This cost per tie ranges between 30 and 50 cents. If the tie account were restated today to reflect the actual cost of the ties that are in the track structure, the investment accounts would be increased over $1 billion.

(4) *Contention.*– That, in the case of a railroad reorganization, the net investment of the predecessor company has been continued on the books of the reorganized company; and further, that where one railroad acquires another for less than its book value the net investment of the railroad acquired is entered on the books of its new owner the same as on the books of the old company.

Comment.– These statements are basically true with respect to transactions occurring in past years. It should be clarified, however, with respect to reorganized companies, that we have required the reorganized company to adopt in its primary property accounts the "original cost" as determined by the Commission at time of the carrier's basic valuation, brought forward to the date of the transaction, in lieu of using the actual account balances reflected on the predecessor company's ledger. In many instances this adjustment of the accounts has actually resulted in a writedown of property account balances. The use of this procedure perpetuates for investment account purposes the cost of property at the time it was first dedicated to public service.

Statutory standards.– The present inquiry into respondents' cost and revenue need must be conducted in the light of the standards set forth in the Interstate Commerce Act. The rule of ratemaking, section 15a(2), provides:

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

In testing, first, whether the proposed rates will move the traffic, we reserve for further consideration in Sub-Nos. 3-11 such questions as discrimination, preference, and prejudice. The question at hand relates to the general freight rate level—are the proposed rates so unreasonably high as to be self-defeating? We

think not. As shown in appendix D hereto, the carload freight rate level has declined from the peak reached in 1958, while consumer and wholesale prices have steadily trended upward. Since the Ex Parte No. 223 increase the carload freight rate index (1950=100) declined from 114 in 1961 to 104 in 1966. Referring again to appendix A, respondents' average operating revenue per 1,000 gross ton-miles declined from $6.50 in 1961 to $6.30 in 1967. If all of the proposed increases are made effective, the latter average, for the constructive year will become $6.65. We agree with the judgment of respondents' traffic officers that the contemplated rate level would have no material adverse affect on the movement of traffic. We have previously found that respondents are in need of the additional freight revenue here sought to offset, in part, their increased operating expenses, including fixed charges and contingent interest. We conclude that the proposed rate level, generally speaking, is within the zone of reasonableness, where management is accorded substantial freedom in service pricing. This conclusion, we emphasize, is not a prejudgment of the issues in Sub-Nos. 3-11.

Exceptions.—Our conclusions as to the issues in Sub-Nos. 3-11 will be the subject of a separate and final report, which will embrace all of the tariff schedules under investigation, and will result in automatic refunds to shippers to the extent the proposed rates and charges are found unlawful. Our order herein, by permitting most of the proposed rates and charges to become effective at this time, will provide substantial immediate relief to respondents. We are, however, excepting from the scope of our order, and are retaining under suspension pending further consideration in Sub-Nos. 4 and 5, master tariff item 845, pig iron and iron and steel scrap and item 515, grain and grain products. The authority contained in our order of June 19, 1968, to increase respondents' rates 3 percent (subject to stated maximums) will be continued in force in regard to these two items.

FINDINGS

We find:

1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation

system will be adversely affected unless the proposed increased interstate freight rates and charges, with the exceptions noted in our order, are permitted to become effective at this time.

2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

3. The increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges. This finding, however, is without prejudice to other or different findings to be reached in Sub-Nos. 3-11 in regard to particular rates and charges.

4. All of the tariff schedules under investigation, including those herein permitted to become effective, are subject to an automatic refund provision; and, with the other remedial provisions of the act, the shipping public in general is reasonably protected. On the other hand, withholding of the authority herein authorized would result in irreparable injury to respondents and would be contrary to the public interest.

5. Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act.

An appropriate order will be entered, including such modification of our outstanding orders and granting such forth-section relief as may be necessary to permit the suspended schedules to become effective, to the extent indicated herein, on 1 day's notice, pending further order of the Commission.

APPENDIX A

UNIT COSTS AND UNIT REVENUES

Railroads of class I in the United States

Year	Gross ton-miles excluding locomotives (billions)	Total operating expenses[a] (millions)	Total operating revenues (millions)	Average per 1,000 gross ton-miles	
				Expenses[a]	Revenues
	1	2	3	4	5
1961	1,413.0	$8,408.9	$9,189.1	$5.95	$6.50
1962	1,459.9	8,557.4	9,439.9	5.86	6.47
1963	1,499.7	8,589.8	9,559.5	5.73	6.37
1964	1,557.6	8,900.4	9,856.5	5.71	6.33
1965	1,608.7	9,082.7	10,207.8	5.65	6.35
1966	1,688.6	9,422.5	10,654.7	5.58	6.31
1967	1,645.3	9,622.2	10,366.0	5.85	6.30
1968[e]	1,675.5	9,987.5	10,799.8	5.96	6.45
C. Y.	1,675.1	10,132.6	11,136.5	6.05	6.65

a—Includes operating rents and taxes other than Federal income taxes.
e—Estimated.
C. Y.—Constructive year with proposed rate increases.

APPENDIX B

TRAFFIC, EMPLOYMENT AND CONDENSED INCOME ACCOUNT

Railroads of class I in the United States

Line No.	Item	1966	1967	1968	Constructive year
	1	2	3	4	5
			millions		
1	Revenue ton-miles	$738,395	$719,755	$744,470	$744,203
2	Revenue passenger-miles	17,085	15,201	12,792	12,792
3	Gross ton-miles, freight and passenger service, excluding locomotives	1,688,642	1,645,274	1,675,453	1,675,135
4	Average number of employees	630,895[1]	610,192[1]	589,591[1]	592,322[1]
5	Net investment	26,820.4	27,628.8	27,817.3	27,817.3
6	Operating revenues—total	10,654.7	10,366.0	10,799.8	11,136.5
7	Freight	9,280.6	9,130.2	9,725.0	10,052.3
8	Passenger	543.6	485.4	416.6	417.5
9	Mail	304.0	263.6	195.0	195.2
10	Express	67.3	60.7	43.7	44.1
11	All other	459.1	426.1	419.5	427.4
12	Operating expenses—total	8,117.7	8,203.3	8,460.0	8,594.0
13	Wages charged to expenses	4,605.8	4,639.5	4,795.9	4,893.1
14	Depreciation and retirements	744.8	763.9	785.0	787.8
15	Other expenses	2,767.1	2,799.9	2,879.1	2,913.1
16	Taxes—total	968.4	910.5	973.4	1,025.9
17	Payroll	439.1	477.2	508.0	515.8
18	Federal income	186.3	66.5	94.4	136.5
19	Other	343.0	366.7	371.0	373.6
20	Equipment and joint facility rents net dr.	522.8	574.9	648.5	649.2

Railroads of class I in the United States—Continued

Line No.	Item	1966	1967	1968	Constructive year
	1	2	3	4	5
			millions		
21	Net railway operating income	$1,045.9	677.4	717.9	867.4
22	Rate of return (line 21÷5) (percent)	3.90	2.45	2.58	3.12
23	Other income	399.5	457.5	427.0	420.1
24	Miscellaneous deductions	78.1	84.3	85.0	83.6
25	Fixed charges and other deductions	463.5	495.9	517.7	517.8
26	Ordinary income	903.8	554.7	542.2	686.1

1—Whole numbers.

APPENDIX C

Operating expenses, rents, taxes, and fixed charges (excluding Federal income taxes)

	Eastern district		Southern district		Western district	
	1966	Constructive year	1966	Constructive year	1966	Constructive year
			millions			
Operating expenses	$3,240.3	$3,396.7	$1,205.7	$1,328.3	$3,671.6	$3,869.0
Equipment and joint facility rents	245.2	335.9	79.6	92.8	197.9	220.5
Taxes	340.9	384.1	144.3	161.3	483.2	483.5
	3,826.4	4,113.7	1,429.6	1,582.4	4,352.7	4,573.0

Operating expenses, rents, taxes, and fixed charges (excluding Federal income taxes)—Continued

	Eastern district		Southern district		Western district	
	1966	Constructive year	1966	Constructive year	1966	Constructive year
	millions					
Less Federal income tax	$41.6	$39.7	$27.6	$28.6	$117.1	$68.2
Total operating costs	3,784.8	4,074.0	1,402.0	1,553.8	4,235.6	4,504.8
Gross ton-miles	583,968	569,957	280,349	283,749	824,325	821,429
Ratio, constructive year/1966	1.000	0.976	1.000	1.012	1.000	0.996
1966 costs at constructive year volume	3,694.0		1,418.8		4,218.7	
Fixed charges, contingent interest	222.6	244.4	76.6	88.9	164.3	184.5
Total operating expenses and fixed charges	3,916.6	4,318.4	1,495.4	1,642.7	4,383.0	4,689.3
Increase over 1966		401.8		147.3		306.3
Percent increase		10.26		9.85		6.99

APPENDIX D

Comparison of BLS consumer price and wholesale price indexes with I.C.C. index of railroad construction costs and freight rate indexes

Year	Consumer price	Wholesale price	Annual railroad construction costs	Railroad carload freight rates
		1950=100		
1947	92.8	93.5	89.6	80
1948	100.0	101.8	98.3	93
1949	99.0	96.2	98.6	99
1950	100.0	100.0	100.0	100
1951	108.0	111.4	106.2	102
1952	110.4	108.3	109.4	109
1953	111.2	106.8	113.2	111
1954	111.7	107.0	115.9	109
1955	111.5	107.4	116.7	108
1956	113.0	110.8	125.7	112
1957	116.9	114.1	132.3	118
1958	120.2	115.7	135.4	121
1959	121.1	115.9	138.2	118
1960	123.0	116.0	138.5	116
1961	124.3	115.6	137.8	114
1962	125.8	115.9	137.5	112
1963	127.3	115.6	137.2	109
1964	129.0	115.8	137.2	107
1965	131.1	118.1	137.8	105
1966	134.9	122.0	140.3	104
1967	138.7	122.2	N.A.	1050

p—preliminary

APP C

Served January 27, 1969

30440

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968

Decided January 9, 1969

Proposed increases in railroad freight rates and charges intraterritorially within eastern, western, and southern territories, and interterritorially between such territories found just and reasonable except as specifically provided herein. Appropriate order entered, including such modification of our outstanding orders and fourth and sixth section relief as may be necessary to permit the increases approved to be established and maintained.

Appearances as shown in prior report.

Additional appearances: *W. R. Humphrey, Jr., S. J. Jablonski,* and *Gerald E. Stitt* for protestants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Our prior report in this proceeding, decided November 25, 1968, (332 I.C.C. 590), concerned primarily the issue of the increased operating costs of the railroad respondents and the extent to which a need for increased revenues had been proved. We there found that the respondents had established the need for additional revenue at least as great as that sought by the proposed increases in their rates and charges, and partially vacated our order of June 19, 1968 which suspended operation of the schedules of proposed increases, but permitted an increase of 3 percent to become effective pending the outcome of this proceeding. The proceeding was continued for the consideration of the lawfulness of the proposed and interim increases as they applied to specific commodities and services, and of the evidence and arguments of all parties with respect thereto. The procedural history of the case is set forth in our prior report and will not be repeated. Our findings as to increased railroad operating costs and revenue need, as set forth and explained therein, are adopted and made part of this report as though fully restated. Those findings, together with the

further findings made in this report, constitute the basis for our ultimate conclusions and order herein.

The proposed increases vary from 3 to 10 percent, or by specific amounts generally within that range. Many protestants object to this approach contending that it is productive of discriminations. The higher increases on certain commodities or services, however, stem from recognition by the respondents of the extent to which rates on those commodities or services can be increased without producing substantial loss of traffic to competing forms of transportation or substantial reduction in the volume of traffic. Where lesser increases apply they reflect a determination by the respondents that any greater amount would not, at this time, result in increased revenues. While a single percentage increase has the appearance of uniformity and nondiscriminatory treatment of shippers, we have indicated in the past the need for a more selective approach. Even where uniform increases have been approved, competitive conditions have quickly required the carriers to make revisions with respect to specific commodities in order to retain traffic. The consequence has been, within a short time, an increased rate structure as varying as here proposed.

Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed. We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370.

The Manufacturing Chemists' Association asserts that the additional revenue to be derived from chemical traffic under the proposed increases is excessive and out of proportion to the volume of chemical traffic. Other protestants have called attention to similar conditions with respect to their traffic, and to the fact that in particular rate tariffs, various railroads have flagged out of the increases on various commodities in whole or in part. The contention is made that the respondents are assessing an unreasonable proportion of the increased revenue need upon some industries while failing to assess a reasonable proportion upon others. That different commodities or services make varying

contributions to net revenue is well recognized. *Sugarcane From South Florida to Clewiston, Fla.*, 281 I.C.C. 47, 63. Our authority under section 15(1) in respect to rates rests upon a finding that the proposed rate is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of the Interstate Commerce Act. The criteria provided by the statute, including those set forth in section 15a(2), do not comprehend consideration of the extent to which the overall movements of particular commodities contribute to net carrier revenue in a proceeding of this nature. We are concerned with the lawfulness of the increased rates and charges applicable to the various commodities and services; the effect of such increases on the movement of traffic; the need, in the public interest, for adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and the need for revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

One of the primary contentions made by protestants is that the increases will result either in drying up movement of particular commodities or diversion of the traffic to competing forms of transportation, to such an extent that there will be no actual revenue increase produced. They seek to have us apply the criteria set forth in section 15a(2) of the act and bar the increases on the ground that they would be self-defeating. The respondents assert that such consequences will not ensue. While we shall refer to certain of these arguments hereinafter in connection with specific commodities, we observe at the outset that predictions of this nature are always diametrically opposed in rate increase cases and must be treated as having limited probative value. For these reasons, denial of rate increases for which need has been established would require evidential support more reliable and persuasive than has been provided in this record.

A number of protestants submitted studies showing costs and revenues for the transportation of particular commodities or types of traffic. It is contended that revenues from present rates, without the increases, now exceed out-of-pocket costs, and, in many instances, fully-distributed costs, by substantial margins. Increases, it is argued, are not justified in such cases. A related contention is that the respondents have failed to show that the increases in operating costs directly related to the transportation of specific commodities are proportional to the rate increase proposed for such commodities. Neither of these contentions is

sufficient to warrant denial of the increases. It is clear that rates substantially in excess of full costs do not necessarily exceed a maximum reasonable level. *General Motors Corp.* v. *New York Central R. Co.*, 311 I.C.C. 622, 625. Additional revenue required to meet increased operating costs and fixed charges must be obtained from all traffic insofar as possible, whether or not specific traffic is profitable, or contributes more or less revenue, or incurs more or less costs than other traffic. Costs of specific commodity movements are not in issue. See *Increased Freight Rates, E., W., and S. Territories, 1956*, 300 I.C.C. 633, 676. Our admonition in *Increased Freight Rates, 1967*, 332 I.C.C. 280, 285, respecting a study of the unit costs of performing transportation services did not contemplate detailed, individual studies of particular traffic movements. The compilation, presentation, and evaluation of data in such massive proportions, as urged by protestants, would make impossible the effective prosecution of our regulatory function, and is not required by the Interstate Commerce Act. *United States* v. *Louisiana*, 290 U.S. 70, 76.

Commodity grouping.—On March 7, 1968, the respondents issued a publication entitled Standard Transportation Commodity Code Tariff No. 1 (STCC), effective April 16, 1968, which consisted of a listing of commodities arranged as follows. The code numbers were assigned in general groupings, each designated by a two-digit number from 01 to 42. Subgroupings of commodities within the general groups were assigned numbers containing additional digits up to a maximum of five, preceded by the general group numbers, the arrangement being such that any particular code number includes all commodities more specifically coded with that number that under a heading of fewer digits. Thus for example:

Code 23	Apparel; AAO. Other Finished Textile Products or Knit Apparel.
23 1	Mens, Youths or Boys Clothing;
	aao. uniforms
	exc. leather or sheep lined, or raincoats see 238
23 11	Mens, Youths or Boys Clothing;
	aao. uniforms
	exc. leather or sheep lined see 2386 or raincoats see 2385
23 111	Mens, Youths or Boys Clothing;
	aao. uniforms
	exc. leather or sheep lined see 23861 or raincoats see 23851
23 111 10	Blazers, wool
23 111 50	Lumberjacks, cotton or cotton and wool

23 3		Womens, Misses or Childrens Clothing; aao. infants exc. fur see 237, raincoats see 238 or surgical see 384
23 5		Caps, Hats or Millinery; aao. hat bodies exc. fur see 237

(hao—also applies on)
(exc—except)

Tariff X-259, here in issue, grouped the commodities to which the proposed rate increases applied under separate tariff item numbers but, by use of the Standard Transportation Commodity Code numbers referred to above, made the increases applicable to numerous commodities included within the code groupings. This was accomplished by listing the most general group number and commodity description in the increase tariff. Thus, for example, Item 660 of the tariff provides an increase on STCC 14 716 *Sulphur, crude, liquid, molten or solid.* Reference to STCC Tariff No. 1 shows that Code 14 716 includes as subgroups the following items:

14 716 10 Sulphur (brimstone), ot crude
14 716 15 Sulphur (brimstone), crude
aao. sulphur rock or sulphur balls
14 716 20 Sulphur, liquid or molten
14 716 30 Sulphur residue

(ot—other than)

Some of the protestants have challenged this method of tariff publication as unnecessarily intricate and productive of confusion. We are satisfied, however, that it is a worthwhile step toward the eventual simplification of tariffs and may, with appropriate development and refinement, lead to application of automatic data processing procedures in determining rates. It is also contended that, in certain instances, the grouping of commodities in tariff X-259 by use of the STCC code numbers disrupted relationships in rates between commodities which, for competitive or other reasons, have historically been accorded similar rates and rate

adjustments. In some instances, the respondents have acknowledged that revisions of the tariff are appropriate to retain such relationships. These are considered in this report as they arise in connection with our discussion of the involved commodities. The respondents will be expected to give careful consideration to other such instances when discovered or brought to their attention and to make such revisions as are warranted.

A number of protestants have called attention to the fact that tariff X-259, in referring to the Standard Transportation Commodity Code, identifies it only by reference to the publication of the Traffic Executive Association—Eastern Railroads, Agent, I.C.C. C-686. It is argued that, since this publishing agent acts only for eastern railroads, all other railroads (except in joint-line haul situations) are without authority to employ the master increase tariff X-259 by reference to the commodity groupings in the code. We consider this contention lacking in merit. Reference in the master tariff to the publication of the code by one of the agents is sufficient.

Commodities generally.—Respondents propose to increase their class rates by 5 percent. On commodity and exceptions rates, in those instances where specific carload rate increases are not published, the proposed increase is 6 percent. Only new, sporadic, or light and bulky traffic moves at carload class rates and only a few class I railroads offer unrestricted less-than-carload service. The respondents also propose to increase their per-car minimum charges for line-haul service 5 percent between and within southern and western territories, excluding some destinations on The Chesapeake and Ohio Railway Company. There is no substantial evidence in opposition to these increases. The class I railroads in 1966 incurred a deficit of more than $100 million in handling less-than-carload traffic. We are of the opinion that the proposed increases of the foregoing rates and charges will be just and reasonable.

Accessorial services.—Respondents propose to increase accessorial service charges 6 percent with various exceptions. For example, charges for split delivery, loading, or unloading are increased 5 cents per 100 pounds or $1 a ton, except that in eastern territory the charges would be increased 6 percent, and a $3 minimum increase is provided in some instances. Certain of the protestants who must use the railroads' services pay substantial sums for accessorial services and they claim that the increases in such charges are excessive or discriminatory.

The charges for accessorial services were increased between 1960 and 1967; thus the respondents did not forego such increases as they did in connection with their line-haul rates. Nevertheless, respondents' evidence shows that their territorial average out-of-pocket costs of providing accessorial services generally exceed the charges made for these services. Since this proceeding is to determine the lawfulness of the proposed increases, rather than inequities in particular charges, individual cost studies at the numerous locations were not required.

Different accessorial charges are provided for like services on different commodities or at different localities. Thus, higher transit charges are applied on lard or shortening than on canned goods; and transit charges at Chicago, Ill., are maintained per 100 pounds, which results in greater charges for large shipments than charges stated per unit other than weight. Some protestants argue that the lower charges should be increased to cover more of respondents' costs, and that the higher charges should not be increased or should be increased by lesser amounts. Numerous protestants, on the other hand, object to the higher percentage increases in the lower charges which result from use of the $3 minimum. We conclude that the increases in the accessorial service charges are within the zone of reasonableness and that merely showing that they are on relatively different levels does not establish that they are unlawful.

Trailer-on-flatcar (TOFC).—The respondents propose a 6-percent increase in rates and charges for TOFC service, except for ramp-to-ramp service and where specific increases are provided for carload commodity and exceptions rates. The charges for ramp-to-ramp TOFC service would be increased 6 percent between and within eastern and western territories, but 3 percent from, to, and within southern territory. The Virginia State Ports Authority, The North Atlantic Ports Association, Inc., and the Port of New York Authority oppose the increase for ramp-to-ramp service, asserting that it would disturb port rate relationships and cause a substantial diversion of import and export traffic to South Atlantic and Gulf ports; but they have not referred to specific port relationships prescribed by us which will be disturbed by the proposed increases. In the event a prescribed basis is disturbed, the respondents will be expected promptly to restore the relationship.

ITOFCA, Inc., a nonprofit association of shippers, opposes the 6-percent increase in detention charges on trailers provided by

the railroads for TOFC ramp-to-ramp service. It argues (1) that the present charges are excessive when related to the railroads' investment in trailers, the interest on the investment, and the cost of maintenance and (2) that the trailer detention charge is excessive when related to the demurrage charge on a like shipment in boxcars, for which no increase is proposed. In this type of TOFC service the shipper or receiver arranges for the drayage of the trailer between its plant and the railroad's ramp. The shipper or receiver, or his agent, the drayman, has possession of, and can use, the trailer, whereas a boxcar remains on the rail siding and has little use except for possible storage. Thus, trailer detention charges and boxcar demurrage charges cover unrelated services. The detention charge, moreover, may be avoided by promptly returning the trailer to the railroads. We see no reason why this service should not bear a portion of the railroads' increased operating costs and we find no unlawfulness in the proposed increase in the trailer detention charge.

Switching.—A 6-percent increase is proposed in charges paid by the shipper or receiver for intraplant, intraterminal, and interterminal switching. Evidence in opposition to the increases was offered by petroleum, steel, beer, grain, and other interests. Lukens Steel Company noted that its intraplant switching charge had been increased $5, which amounted to 35 percent, under Ex Parte No. 256. The charges at that level ranged between $19.49 and $23.39 per car. The 6-percent increase sought herein would make a total increase of 41 percent, above the pre-Ex Parte No. 256 level. The official territory out-of-pocket cost, increased to the January 1, 1968 level, for providing this service is shown as $30.88 in boxcars and $33.59 in other cars.

The members of Western Pennsylvania Refiners Traffic Association have plants in small communities usually on the line of a single carrier, and they require simple switching services. The association argues that the increases will apply to new minimum charges, which were suspended in Investigation and Suspension Docket No. 8404, Switching Charges, Eastern Territory. Although that proceeding was discontinued July 18, 1968, after the suspended increases were canceled, as pointed out by respondents in their brief, the new minimum charges were then published in their switching tariff and became effective September 13, 1968. The association argues that the proposed increases added to those in Ex Parte No. 256 are in excess of any just and reasonable charge for performing the service. Reference is made to present

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1083 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,

Appellants,

and

STATE OF NEW YORK, DEPARTMENTS OF AGRICULTURE OF THE STATES OF MAINE, *et al.*,

Intervenor-Appellants,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees,

and

ABERDEEN AND ROCKFISH R.R., *et al.*,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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Dated: January 16, 1970

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—and—

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Jurisdictional Statement

Appellants, Atlantic City Electric Company, Niagara Mohawk Power Corporation, Public Service Electric and Gas Company, Rochester Gas and Electric Corporation (hereinafter Plaintiffs-Appellants, or Plaintiffs) and the State of New York, together with the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts (hereinafter

Intervening Plaintiffs-Appellants or Intervening Plaintiffs) appeal from an order of a statutory three-judge court of the United States District Court for the Southern District of New York, dismissing their complaints which sought to enjoin, set aside and annul a final order of the Interstate Commerce Commission (hereinafter "Commission" or "ICC") dated January 23, 1969, which authorized the railroads of the United States (hereinafter "railroads") to put into effect varying freight rate increases on virtually all commodities transported in a total amount of some $440 million annually. Plaintiffs and Intervening Plaintiffs submit this statement to demonstrate that the Supreme Court has jurisdiction and that substantial questions are presented, which require either summary reversal in view of *City of Chicago, et al.* v. *U. S., et al.*, 38 U.S.L.W. 4039 (Dec. 9, 1969), with direction to the court below to hear Appellants' case on the merits, or the presentation of full briefs and oral argument to this Court.

Opinion Below

The opinion of the court below is not yet officially reported. The opinion is submitted herewith as Appendix A.

Jurisdiction

This suit in the United States District Court for the Southern District of New York was commenced on February 28, 1969, under 28 U.S.C. §§1336, 2284 and 2321-25 to enjoin, set aside and annul a final order of the Interstate Commerce Commission dated January 23, 1969. The order of the District Court sought to be reviewed here was dated October 28,

1969 and was entered on that day. The notice of appeal of that order was filed in the District Court on December 18, 1969. The jurisdiction of the Supreme Court is conferred by 28 U.S.C. §§1253 and 2101(b), and is sustained by *Burlington Truck Lines, Inc.* v. *U. S.*, 371 U.S. 156 (1962).

Questions Presented

The questions of law presented on this appeal will not only affect every consumer of railroad-transported commodities in the United States, but raise broader questions of judicial review of administrative action, which this Court, in the *City of Chicago* case, appears to have dealt with in a manner contrary to the decision below.

1. Is the decision below, holding that shippers (or state agencies representing shippers) may not obtain court review of the final order resulting from an ICC investigatory hearing pursuant to 49 U.S.C. §15(7),* at variance with the principles of judicial review of administrative action set forth in this Court's opinion in *City of Chicago, supra,* in which case the Court stated, among other things:

* 49 U.S.C. §15(7). "Whenever there shall be filed with the Commission any schedule stating a new . . . rate, . . . the Commission shall have, . . . authority, either upon complaint or upon its own initiative, . . . to enter upon a hearing concerning the lawfulness of such rate, . . . and pending such hearing and the decision thereon, . . . may . . . suspend the operation of such schedule, . . . but not for a longer period than seven months beyond the time when it would otherwise go into effect; and, after full hearing, . . . the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective . . . . At any hearing involving a change in a rate, . . . the burden of proof shall be upon the carrier to show that the proposed rate . . . is just and reasonable . . ."

"When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C. §15(7). Where the Commission finds the proposed rates lawful, its order reads 'the investigation proceedings [are] discontinued'. . . . *Such orders are reviewable.* . . ." (Emphasis added.)*

2. Regardless of whether the *City of Chicago* decision is deemed to be controlling of the instant proceeding, when the ICC conducts an investigatory hearing pursuant to 49 U.S.C. §15(7), is the court below in error in holding that there can be no judicial review of the procedures followed by the ICC during that hearing and of the final order resulting therefrom?

3. Did the court below err in dismissing, on motion for legal insufficiency, which assumed the correctness of the facts alleged, complaints seeking to set aside such an order of the Commission when Plaintiffs' complaint alleged that such order was entered after an investigatory hearing in which there was:

(a) no representation of the public interest by Commission staff, counsel, or otherwise;

(b) no evidence that the new rates would be just and reasonable;

(c) no evidence by the railroads as to their costs for providing transportation services for any commodity; and

---

*The *City of Chicago* decision is also believed to be at variance with the decision of the U. S. District Court for the District of Columbia in *Alabama Power Co., et al.* v. *U. S., et al.*, December 4, 1969, F.Supp. , a case arising from the same order of the Commission which is here appealed.

(d) uncontroverted evidence that such increased rates would adversely affect the movement of traffic;

and Intervening Plaintiffs' complaint alleged, *inter alia*, that the Commission arbitrarily refused to consider cost studies which showed disproportionately high contributions to rail revenues on traffic subjected to relatively high percentage increases, and refused to find undue prejudice to the Northeast based on a misconception of the percentage increase actually authorized in the South?

Statement of Facts

In the court below, Plaintiffs' and Intervening Plaintiffs' complaints were dismissed on motion by the Commission, supported by the railroads, on the ground that such complaints failed to state a claim upon which relief could be granted. In effect, the court held that no matter how wrong the Commission's decision was, that decision was immune from judicial review.

The Department of Justice, on behalf of the United States, a mandatory defendant herein, has consistently declined to participate in the case.

It is of the utmost importance that this Court realize that Plaintiffs and Intervening Plaintiffs were not and are not seeking to have the court below or this Court determine the justness and reasonableness of increases in freight rates on any specific commodity. What these Appellants were and are seeking is a review of the methods and procedures used by the Commission and the evidence, or lack of it, underlying its authorization for such rates to become effective, and its findings that the increased rates

proposed by the railroads would be just and reasonable, and would not adversely affect the movement of traffic.

It is Appellants' position that the record contained no support for the Commission's conclusion that the rates were just and reasonable; nor for its determination that such rates would not adversely affect the movement of traffic; and, further, that the Commission erred in failing actively and affirmatively to serve consumers by itself investigating the proposed rates and making the expertise of its staff and the voluminous statistical data in its files available for the development of a proper record. The Commission refused to consider uncontroverted cost studies showing the rail revenue contribution of traffic on which it authorized relatively high percentage increases. It further refused to consider the actual percentage increases authorized on grain in the South in determining whether the Northeast was subjected to undue prejudice. In the absence of a record adequate to support its affirmative findings, the Commission was required by the Interstate Commerce Act, by the Administrative Procedure Act and by constitutional requirements of due process to disapprove the proposed increased rates. Since the inadequacies of the record specified in the complaint were conceded by defendants by the motion they made in the court below, the sole issues are whether the Commission's order was lawful and whether that order is reviewable. The lawfulness of the order was not determined by the court below; its decision related solely to non-reviewability.

The facts which gave rise to the instant case are set forth in Plaintiffs' complaint. By their motion to dismiss that complaint, defendants of necessity admitted those facts, which are:

In March, 1968, the defendant railroads filed with the Commission "Master Tariff X-259" which provided for rate increases on virtually all commodities carried by the railroads (¶ 6);* such increases varying by commodity, and in some instances, by region, from 3% to 10% (¶ 6). After receiving numerous protests, by order of June 19, 1968 the ICC allowed an interim increase of 3% on all commodities; suspended the tariff, and ordered investigatory hearings on the proposed increases (¶ 6). (This order of June 19, 1968 is not under review here.)

By its order of January 23, 1969, the Commission ordered that "this proceeding be, and it is hereby, discontinued" (332 I.C.C. 714, 793), and permitted the railroads to put into effect virtually all of the increases set forth in Master Tariff X-259. The Commission specifically found the increased rates "just and reasonable"; that they "will not exceed a maximum reasonable level" and that they "will have no undue adverse effect on the movement of traffic." (332 I.C.C. at 792)

At the hearings, to which Plaintiffs and Intervening Plaintiffs were parties, there was no evidence presented in support of the justness and reasonableness of the proposed rates. The Commission did not itself affirmatively examine into the justness and reasonableness, or any other aspects, of the proposed increases (¶ 9). No Bureau, Section or employee of the Commission was a party to the proceedings; nor was there any representation of the national consumer interest by the Commission through its counsel or otherwise (¶ 10). There was no evidence presented by the railroads as to their costs for providing the transportation services for any commodity, although such evidence was requested by Plaintiffs, Intervening Plaintiffs and many other parties to the proceeding. All

* Numbers refer to paragraphs in Plaintiffs' complaint; additional facts set forth in Intervening Plaintiffs' complaint follow.

such requests were repeatedly refused by the railroads and such refusals were upheld by the Commission (¶12). There was no evidence in the record to refute evidence presented by shippers that substantial loss of traffic would result if the proposed increases became effective (¶13). There was no evidence presented by the railroads to justify increases of 3% on some commodities, 5% on others, and 10% on still others (¶14). However, there was substantial and uncontroverted evidence presented by shippers, including Plaintiffs and Intervening Plaintiffs, that some commodities, prior to the imposition of the requested increases, produced a disproportionate return to the railroads over and above the cost to them of providing the transportation service for that traffic (¶14).

In addition to the general findings which the Commission made with respect to all increases, it also made specific findings with respect to bituminous steam coal, and feed and grain. It based its findings as to the effect of the proposed rates on the movement of coal traffic on its opinion that "costs of other forms of transportation, and of competing fuels are also increasing" (332 I.C.C. at 734), for which opinion there was no supporting evidence; and upon the explicit assumption that "should a competitive situation arise, appropriate adjustments can be made by producers and carriers", although there was not a scintilla of evidence in the record to support the assumption that "adjustments can be made by producers". (332 I.C.C. at 734, ¶ 13.)

As to grain, the Commission refused to consider a cost study submitted by Intervening Plaintiffs, which demonstrated that that traffic showed a disproportionately high contribution to rail revenues before the requested increases were imposed upon that traffic. (Intervening Plaintiffs' complaint, ¶ 10(a).)

The Commission's order holding that Intervening Plaintiffs suffered no undue prejudice was based on

a misconception concerning the percentage increase authorized in other regions. (Intervening Plaintiffs' complaint, ¶ 10(c).)

ARGUMENT

I.

The Decision Below Denying Review Conflicts With This Court's Decision in the *City of Chicago* Case.

On December 9, 1969, Mr. Justice Douglas, writing for a unanimous Court, in *City of Chicago, et al.* v. *U. S., et al.*, 38 U.S.L.W. 4039, a case reviewing orders of the Interstate Commerce Commission relating to the discontinuance of train passenger service, held that once the Commission decides to conduct an investigatory hearing, it must then conduct it properly and that its resulting decision is reviewable.

> "A decision to investigate indicates that a substantial question exists under the statutory standards. The Commission's report therefore deals with the merits. We cannot say that an answer that discontinuance should not be allowed is agency 'action', while an answer saying the reverse is agency 'inaction.' The technical form of the order is irrelevant. In each case the Commission is deciding the merits." 38 U.S.L.W., at 4040.

The Court then cited its earlier decision in *Rochester Telephone Corp.* v. *U. S.*, 307 U.S. 125 (1939).

In this case, the ICC's January 23rd order, which discontinued its investigation into the proposed increases, authorized the railroads to put those increases into effect immediately, and thereby immediately affected Appellants'

rights.* Thus, the *Rochester Telephone* decision and the two additional decisions discussed immediately below, are directly on point.

Rochester Telephone was an appeal from a final decree by a three-judge district court dismissing on the merits a bill to review an order of the Federal Communications Commission, which order had found Rochester subject to FCC jurisdiction. Justice Frankfurter, writing for the Court, found that the FCC order was reviewable because it

> "was not a mere abstract declaration regarding the status of the Rochester under the Communications Act [footnote omitted], nor was it a stage in an incomplete process of administrative adjudication." (307 U.S. 125, 143.)

The judgment rendered was a " 'final and indisputable basis of action as between the Commission and the defendant' " (307 U.S. 125, 143). Justice Frankfurter noted that such an order could be reviewed to determine "questions affecting constitutional power, statutory validity and the basic prerequisites of proof." (307 U.S. 125, 140.) Those are the very questions which this Court is now asked to pass on in the instant case.

The scope of reviewability set in the *Rochester* case has been expanded by two more recent cases in addition to *City of Chicago, supra.* Those cases, like the instant appeal, also arose under the Urgent Deficiencies Act: *Columbia Broadcasting System* v. *U. S.*, 316 U.S. 407 (1942), and *Frozen Food Express* v. *U. S.*, 351 U.S. 40 (1956).

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* The proposed increases were in fact put into immediate effect by the railroads.

In the *CBS* case, the Federal Communications Commission had issued a rule providing for the non-renewal or revocation of licenses of stations whose contracts with a broadcasting network contained certain prescribed conditions. The Court held the FCC regulation a reviewable "order", even though it did not formally apply to CBS, and no contracts or licenses had been cancelled. In deciding that review was possible despite this seeming lack of finality, the Court said:

> "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it." 316 U.S. 407, 420.

In *Frozen Food Express,* the express company, a motor carrier not a party to the prior administrative proceeding, instituted a suit in a statutory three-judge court to have findings and order of the Interstate Commerce Commission enjoined and set aside. The findings related only to the status of certain agricultural commodities which Frozen Food often carried. The order would have made it necessary for Frozen Food to obtain a certificate of public convenience and necessity, where its carriage before the order was exempt. The mere possibility that the Commission might issue a cease-and-desist order and the legal consequences thereof were held by the Court to make this determination a reviewable order.

Furthermore, the above cases make clear that the existence of hollow procedural rights (e.g., filing a complaint procedure in the ICC pursuant to 49 U.S.C. §13*) does not preclude review of an order in which the agency has decided all real substantive rights. We stress that to require the plaintiffs to proceed before the Commission pursuant to Section 13 amounts to denying them any effective relief. Our research has failed to disclose a single instance where any shipper has obtained any adjustment in rates made effective following an order of the Commission made in a general revenue proceeding, such as the one of which review is here sought.**

In *City of Chicago,* the Court analogized to situations such as the instant case, where new rates have been filed, stating, as previously noted:

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* Section 13(1) of the Interstate Commerce Act reads:

"(1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

** See discussion of *Koppers* case at p. 16, *infra.*

> "When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C. §15(7). Where the Commission finds the proposed rates lawful, its order reads 'the investigation proceedings [are] discontinued.' . . . *Such orders are reviewable. . . .*" (Emphasis added)

It appears, therefore, that the decision below and the decision of the U. S. District Court for the District of Columbia in *Alabama Power Co., et al.* v. *U. S., et al.*, are incorrect, *supra*. This Court has stated that orders of the Commission entered after investigation are reviewable. The court below should be advised by this Court of its error in finding otherwise.

The Dissent in the *Alabama* Case

Hon. J. Skelly Wright, a Judge of the District of Columbia Circuit Court of Appeals, sitting on the statutory three-judge court in the District of Columbia case, *Alabama Power Co., et al.*, v. *U. S., et al.*, referred to, *supra*, dissented from the opinion of the majority there, holding that that Court should have decided whether the Commission's action was supported by substantial evidence. He noted, correctly, that Plaintiffs were not seeking review of any rates, which review could be obtained by filing a Section 13 complaint, but rather were challenging the propriety of the Commission's order *in toto*. He found that Plaintiffs were aggrieved parties under the terms of the Administrative Procedure Act.

Judge Wright further correctly held:

> "Considering challenges to the general order now would avoid needless relitigation of the same issue

before the Commission in countless [§13] rate-making proceedings involving individual commodities."

Therefore, this Court could properly summarily reverse the decision of the court below, and order it to hear the case on the merits, on the grounds that the issues raised by the instant case were resolved by the principles cited as controlling by this Court in *City of Chicago* v. *U. S.*, *supra*. Judge Wright's dissent, *supra*, also supports such a summary reversal.

II.

The Commission's Order Is Reviewable.

If this Court should find that *City of Chicago* is not directly controlling of the instant case, it is submitted respectfully that it should note probable jurisdiction and order Appellants to present briefs and oral argument because of the substantial questions of law involved.

If the decision below is permitted to stand, it means that an order of the ICC permitting the railroads to increase freight rates by millions of dollars annually may not be judicially reviewed,* regardless of whether, as Appellants here contend, such order violates shippers' constitutional rights and their statutory rights under the Administrative Procedure Act and the Interstate Commerce Act. It is

* Apparently the ICC regarded the decision below as approval of the illegal procedures which it followed in this proceeding. Subsequent to the Southern District's decision which is here appealed, it decided to allow the railroads to increase their freight rates by some additional $660 million annually in a proceeding (*Ex Parte 262 Increased Freight Rates, 1969*, —— I.C.C. —— (November 17, 1969)) in which no evidence on justness and reasonableness was even allowed to be submitted, despite shippers' pleas to permit them to present their case.

submitted that to so hold is in clear violation of fundamental concepts of justice and of judicial review.

It must be borne in mind that the procedure suggested by the District Court does not constitute an avenue of review of the ICC's final order of January 23, 1969. What the District Court suggests (without citation of authority) is that an additional proceeding be brought before the Commission under Section 13 of the Interstate Commerce Act (49 U.S.C. §13) in which the Plaintiffs could "preserve the objections which they now assert to the procedure leading up to the general revenue order."

However, a Section 13 proceeding would be directed solely to the justness and reasonableness of specific rates. It would be impossible, in any appeal from such a proceeding, for a plaintiff to complain of errors in the prior general revenue proceeding, such as, e.g., failure of the Commission staff to participate.

Further, it is Plaintiffs' contention that they should not be directed to assume the burden of instituting a Section 13 proceeding until the carriers have borne their statutory burden of proof in a properly conducted revenue proceeding.* The failure of the carriers to sustain their burden of proof becomes moot once the Section 13 proceeding is instituted, as the Commission itself has held in a prior case, wherein other shippers attempted to follow what the court below has suggested:

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* In its final order of January 23rd, the Commission found proposed increases on certain commodities unlawful, such as those on shelled walnuts, potash and fly ash, thereby belying any intent to relegate all shippers for relief from the increased rates to Section 13 procedures.

"Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that [general revenue] proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." *Koppers Co. Inc.* v. *Chesapeake & O. Ry.*, 303 I.C.C. 383, 387 (1958).

Statutes Require Review

The Urgent Deficiencies Act, now embodied in 28 U.S.C. §1336, provides:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." 62 Stat. 931.

There is no contention here that Congress made any other provision for judicial review of the ICC's order of January 23, 1969, the order challenged here and in the District Court below, neither is there any question that Appellants properly complied with the procedures set forth in 28 U.S.C. §§2321-2325 relating to actions in district courts to enjoin orders of the ICC.

The Administrative Procedure Act, 5 U.S.C. §702, provides that

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Plaintiffs are adversely affected by the Commission's order because it requires them to pay more than $2 million

additional in annual freight bills after a proceeding in which their constitutional and statutory rights were violated. Intervening Plaintiffs are adversely affected because the increase in the rail freight rates on feed and grain resulted in an additional burden on Northeastern agriculture of more than $2.4 million annually, and their rights were similarly violated in the same proceeding.

Section 706 of the Administrative Procedure Act provides that:

"... The reviewing court shall

(2) hold unlawful and set aside agency action, findings, and conclusions found to be— ...

(B) contrary to constitutional right ...

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence ..."

Appellants' complaints demonstrated that the Commission's order was contrary to constitutional right, was made without observance of procedure required by law and was unsupported by substantial evidence. The respects in which that order so violates Appellants' right are set forth *infra* under Point III.

With regard to the paramount importance of the availability of judicial review of administrative action in order to protect constitutional rights, Mr. Chief Justice Berger, writing in *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964), held that:

"Action challenged as a denial of due process—whether substantive in the sense of being arbitrary or by capricious classification, or procedural in the

sense of denying minimum safeguards—could be immune from judicial review, if ever, only by the plainest manifestation of congressional intent to that effect." 334 F. 2d 570 at 575 (1964) *cert. den.* 381 U.S. 904 (1965).

This same principle of the right of aggrieved parties to judicial review of administrative action has been reiterated by this Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 at 140 (1967), where this Court stated:

"... . [A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." [Citing cases.]

This Court further observed in that case that this principle was reinforced by the enactment of the Administrative Procedure Act, which embodied the

"basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. §702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. §701 (a). The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is not other adequate remedy in a court,' 5 U.S.C. Sec. 704." 387 U.S. 136, 140.

The Constitution Requires Review

The methods of the Commission in arriving at its decision, which are discussed below, were a clear violation of its

own enabling statute and of the Administrative Procedure Act. Therefore, the resulting order, placing an additional, undue burden on Appellants, of millions of dollars annually in freight rates, violates their Constitutional rights to due process.

The Constitution condemns all "arbitrary exercise of power", *ICC* v. *Louisville & N.R.R.*, 227 U.S. 88, 91 (1913). In 1965, this Court declared that "delegated power, of course, may not be exercised arbitrarily" *FCC* v. *Schreiber*, 381 U.S. 279, 292 (1965), thereby holding consistently with its opinions as far back as 1886 when it held that there is no place in our constitutional system for the exercise of arbitrary power, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

It is submitted that the methods and procedures of the Commission in conducting the hearing below, including its failure to require the railroads to sustain their burden of proof, the making of findings without evidentiary support, and its own complete lack of participation in the proceedings, make its ultimate decision arbitrary and illegal. In effect, the Commission stood silently on the sidelines, while the railroads, in their usual unified fashion, recited an alleged overall need for additional revenues. The shippers and consumers of the nation, with their differing interests, by their objections, proffered evidence, briefs and oral argument, sought to make clear to the ICC that to permit the railroads to increase their rates on this basis alone was contrary to law. The Commission blandly ignored the evidence so presented, and proceeded to make findings and an order denying their rights to due process. This Court is now requested to reverse and remand the decision below, so that the ends of justice will be served, not only in this proceeding, but in future ICC proceedings.

The *Algoma Line of Cases is not Controlling**

The court below decided that Appellants' complaints should be dismissed because of prior district court decisions** holding that shippers affected by a general rate increase must bring a Section 13 complaint in the ICC. Thus, the court mistook the nature of Appellants' complaints in the instant case—they were not and are not complaining about any specific rates, but of the methods used by the Commission in arriving at its order permitting the increases. Plaintiffs in the three cases relied upon, however, *were* complaining about specific rates, and, therefore, the remands to Section 13 proceedings were correct.*** In *Algoma,* the subject of the requested judicial review was the failure of the Commission to suspend new rates, a matter found to be within the exclusive discretion of the Commission, 11 F. Supp. 495-496.

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* *Algoma Coal & Coke Co.* v. *U. S.*, 11 F. Supp. 487 (E.D. Va., 1935).

** *Algoma, supra; Koppers Co.* v. *U. S.*, 132 F. Supp. 159 (W.D. Pa. 1955); *Florida Citrus Commission* v. *U. S.*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd. per curiam,* 352 U.S. 1021 (1957).

*** It should be noted however, that in at least two of these cases, *Algoma* and *Florida Citrus,* the reviewing court did look into the evidence to determine if the Commission had acted properly. This fact is noted by Judge Wright in his dissent in the *Alabama* case, *supra.* He finds that *Algoma* and *Florida Citrus* do sanction the type of preliminary review sought here.

III.

The Commission's Order Is in Error Because It Violates the Constitutional and Statutory Rights of Appellants.

It appears that the decision below considered only the question of reviewability and assumed the errors in the ICC's procedures and order which were alleged in the complaints. Therefore, Appellants will summarize the errors alleged only to the extent necessary to demonstrate that such errors, assumed by the court below, were substantial. This Court is respectfully referred to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss and Intervening Plaintiffs' Memorandum in the court below for a fuller discussion of the following alleged errors.

1. The Commission delegated to the carriers its statutory duty to determine whether the increased rates would adversely affect the movement of traffic.

2. The Commission made findings as to justness and reasonableness without any evidentiary support.

3. The Commission failed to itself affirmatively develop an adequate record.

4. The Commission failed to enforce the burden of proof requirements of its own statute and of the Administrative Procedure Act.

5. The Commission erred in refusing to determine the lawfulness of the rates by regions or groups of carriers rather than by the railroad industry as a whole.

6. The Commission erred in refusing to consider cost studies showing the revenue contribution of various commodities on which it authorized relatively high percentage increases.

7. The Commission erred in relying on a misconception of the percentage increases actually authorized in the South in determining whether the Northeast was subject to undue prejudice.

8. The Commission refused to consider applicable statutory standards, including the Hock-Smith Resolution, 49 U.S.C. § 55.

9. The Commission refused to consider and give appropriate weight to economic conditions in Northeastern agriculture, while according such consideration to other industries.

IV.

Conclusion

Appellants herein request this Court either to summarily reverse the decision below relying on the principles of the *City of Chicago* case, and direct the Southern District Court to hear the case on the merits, or to permit briefs and oral argument on the substantial questions concerning judicial review of administrative action which this appeal presents.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Three-judge Court

69 Civ. 800

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,

Plaintiffs,

—and—

STATE OF NEW YORK, *et al.*,

Intervenor-Plaintiffs,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

—and—

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,

Intervenor-Defendants.

Before:

KAUFMAN, *Circuit Judge,*
BONSAL and MCLEAN, *District Judges.*

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McLEAN, *District Judge*:

Seven public utilities operating in the northeastern section of the United States brought this action to enjoin and set aside an order of the Interstate Commerce Commission made on January 9, 1969, in a proceeding entitled "Ex Parte 259, Increased Freight Rates, 1968." The order permitted the Class I railroads of the United States to put into effect a rate increase on a great number of commodities. Among the rate increases so authorized was an increase of 5 per cent on bituminous steam coal, up to a maximum of 15¢ per ton. Plaintiffs are large users of bituminous steam coal and hence are adversely affected by the order. They claim that the order is unlawful and that the procedures employed by the Commission have deprived them of due process of law.

The State of New York and the Departments of Agriculture of ten other northeastern states have been permitted to intervene as parties plaintiff. They complain of the increase of 6 per cent authorized by the order in freight rates on grain, feed and feed ingredients moving into the northeastern states.

Many Class I railroads have also been permitted to intervene. They support the Commission's order.

The Commission has moved under Rule 12(b)(6) to dismiss the action on the ground that plaintiffs and intervenor plaintiffs have failed to state a claim upon which relief can be granted. In essence, the Commission asserts that the attack upon its order is premature. Decision of this question requires analysis of the Commission's order and consideration of the remedies available to plaintiffs and intervenor plaintiffs under the Interstate Commerce Act. 49 U.S.C. § 1 *et seq.*

The various steps in the proceeding before the Commission which resulted in the order under attack are set forth in two reports of the Commission, an interim report dated November 25, 1968 (332 I.C.C. 590), and a final report dated January 9, 1969 (332 I.C.C. 714). They may be briefly summarized as follows.

On March 7, 1968, the Class I railroads filed with the Commission a petition for permission to publish increased freight rates. The Commission granted their request. On March 11, 1968, the railroads filed their master tariff X-259 containing schedules of proposed increases, to be effective on May 27, 1968. The effective date was later postponed to June 24, 1968. The proposed increases ranged generally from 3 to 10 per cent, depending upon the commodity involved. By order entered June 19, 1968, the Commission suspended until January 24, 1969 all increases in excess of 3 per cent. This order also directed that an investigation be made of the proposed increases.

The investigation was divided into a number of parts, designated as "sub-numbers." "Sub-No. 2" was concerned with "railroad cost and revenue need." Other sub-numbers pertained to the increases requested on particular commodities. Sub-No. 3 was concerned with coal; Sub-No. 5 with grain. Hearings were held before hearing examiners. Plaintiffs and intervenor plaintiffs appeared and protested the proposed increases.

The Commission's interim report dated November 25, 1968 was devoted to the need of the railroads for increased revenue, *i.e.*, Sub-No. 2 of the proceeding. The Commission concluded that "the proposed rate level, generally speaking, is within the zone of reasonableness." 332 I.C.C.

at 608. The Commission went on to find that "the increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges." 332 I.C.C. 609.

It further found:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act." 332 I.C.C. 609.

By order dated November 25, 1968, the Commission vacated its suspension order of June 19, 1968 and permitted the full increases proposed by the railroads to take effect, except as to certain commodities, one of which was grain. As to these, the suspension order was continued.

At the beginning of its final report dated January 9, 1969, the Commission referred to its interim report of November 25, 1968, and stated that the proceeding had been continued thereafter "for the consideration of the lawfulness of the proposed and interim increases as they applied to specific commodities and services, and of the evidence and arguments of all parties with respect thereto." 332 I.C.C. 714.

The Commission then remarked:

"Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed." 332 I.C.C. 715.

The Commission went on to say:

"We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370." 332 I.C.C. 715.

The report then discussed at length the contentions of the parties with respect to proposed increases for various commodities or groups of commodities. With respect to a few of them, not including coal or grain or feed moving to the northeast, the Commission denied the full increases requested by the railroads. As to the others, the railroads' request was approved. As far as material here, the Commission's *ultimate conclusions* and findings were: (1) there is a critical need on the part of the railroads for additional revenue to offset, in part, increased operating costs; (2) the basic freight rates may be increased generally in accordance with master tariff X-259; (3) the increased freight rates will not exceed "a maximum reasonable level"; (4) "Our findings as to justness and reasonableness . . . will apply

to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction." 332 I.C.C. 792.

The Commission's order dated January 9, 1969, based upon this report, provided, in a somewhat back-handed fashion, that the railroads were directed to cease and desist from collecting basic rates "increased to a greater extent than found just and reasonable herein . . ." 332 I.C.C. 793.

It is apparent from this recital that the proceeding before the Commission was a general revenue proceeding. The Commission was concerned primarily with the "need, in the public interest, of adequate and efficient railway transportation service" and with the railroads' "need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." 49 U.S.C. § 15a(2). The increases in rates were general, even though the percentage of increase varied from commodity to commodity. The new rates were "carrier-made," that is to say, the Commission merely authorized the railroads to put the increases into effect, it did not require or prescribe them. It is true that the Commission found these general increases, on an overall basis, to be just and reasonable. But the Commission did not purport to pass upon individual rates as contrasted with the general level. It neither prescribed nor specifically authorized a particular rate on a particular commodity, say coal or grain, from a specific point of origin to a specific destination.

If plaintiffs wish to complain of the reasonableness of a particular rate on the coal that is transported to them from a particular point of origin, they have the right to apply to the Commission under 49 U.S.C. §§ 13 and 15

to prescribe a different rate. The intervenor plaintiffs have the same right as to the rates on grain and feed with which they are concerned. This is what the Commission referred to in stating that its findings would not preclude interested parties from bringing any maladjustments to the Commission's attention. Neither plaintiffs nor intervenor plaintiffs have instituted such a proceeding. The nub of the present controversy is whether or not they must do so before seeking review of the Commission's general revenue increase order.

The Commission argues that plaintiffs and intervenor plaintiffs are attacking the rates on coal and grain respectively, and that this court should not hear them at this time. The Commission contends that the two sets of plaintiffs must first exhaust their remedies under Section 13. If they do, it may turn out that the Commission will heed their protests and will adjust the rates which directly affect them. In that event, their complaint will be satisfied and there will be no need to consider the propriety of the general increase order. Plaintiffs and intervenor plaintiffs, on the contrary, say that in this action they are not attacking the rates on coal and grain as such. They say that they are complaining of the entire order, on the ground, to put it simply, that the Commission acted illegally in making it. They contend that this court should hear them now, without putting them to the trouble and expense of making an application to the Commission under Section 13, an application which may prove to be futile.

It is true that on the face of the complaint, plaintiffs do challenge the entire order and the Commission's conduct of the entire proceeding, not merely the part of it which relates to coal. Although the complaint does not

allege that the Commission erred in finding that the railroads need increased revenues, it does assert that the Commission acted "without evidence in the record as to the justness and reasonableness of such rates." It alleges a number of respects in which the Commission acted improperly, *i.e.*, in not making its Bureau of Accounts a party to the proceeding, in failing to order its examiners to make preliminary decisions, in failing to afford plaintiffs an opportunity to propose findings and conclusions, in failing to require the railroads to submit evidence of cost, in making findings on the basis of unsupported opinion, et cetera.

The intervenors' complaint alleges that the Commission "erred" and "acted arbitrarily, capriciously and abused its discretion" in a variety of ways. For example, the complaint asserts that the Commission rejected evidence that traffic subjected to higher percentage increases was presently bearing a disproportionate contribution to rail revenues, that the Commission refused to consider plaintiffs' cost study, that its findings in various respects were contradicted by the evidence, that it refused to give any weight to economic conditions and trends in northeastern agriculture, et cetera.

The Commission's motion to dismiss is based upon the face of the complaints. It necessarily admits for the purposes of this motion the truth of their allegations, in so far as those allegations are statements of fact rather than legal conclusions. Thus, although the Commission does not admit that it erred or that it acted illegally, arbitrarily or capriciously, it does admit that it did not take the procedural steps which plaintiffs say it should have taken, that it rejected proferred evidence which plaintiffs deem relevant, and the like. Nevertheless, the question remains

whether this court at this time should undertake to pass upon these matters and decide the merits of plaintiffs' claims.

It is clear that the general revenue order which the Commission made here was within its powers under 49 U.S.C. § 15a(2), in view of the impracticability of dealing with specific rates in a proceeding in which hundreds of commodities were involved.

United States v. *Louisiana*, 290 U.S. 70 (1933)
King v. *United States*, 344 U.S. 254 (1952)

As to the reviewability of the order, the Commission and the intervenor railroads rely primarily upon three decisions:

Algoma Coal & Coke Co. v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935)
Koppers Co. v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955)
Florida Citrus Commission v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd*, 352 U.S. 1021 (1957)
See also, Birmingham Slag Co. v. *United States*, 11 F. Supp. 486 (N.D. Ala. 1935)

These cases support the Commission's position here. They held in substance that the court will not entertain a suit to enjoin an order of the Commission in a general revenue proceeding when plaintiffs have not exhausted the remedy afforded them by Section 13 to seek an adjustment of the particular rates which affect them. The distinctions which the present plaintiffs attempt to draw between those cases and this one do not seem to us to be substantial or signif-

icant. The fundamental principle is the same. As the court said in *Koppers*:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15 has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits." 132 F. Supp. at 163.

It may be that in some of the cases cited plaintiffs aimed their attack more directly at the rates authorized by the general revenue order than do the present plaintiffs and intervenors. But the fact remains that in this case as in the others plaintiffs' real concern is with the increased rates which the order authorized on the commodities in which they are interested. If the Commission had not approved a general increase on coal and grain and feed, plaintiffs and intervenors would not be here complaining of the procedures followed by the Commission.

And it is as true in this case as in the others that by pursuing their remedy in a Section 13 proceeding, plaintiffs and intervenors may achieve the relief that they are really seeking, *i.e.*, a reduction in the particular rates on coal and grain and feed. This court cannot assume that the

Commission will deny them relief nor can it relieve them from the necessity of seeking it because to do so may be time-consuming and expensive. In our opinion, this is what the statutory scheme requires. Until this step has been taken, plaintiffs have not suffered any real injury. Only if and when their application under Section 13 is rejected will the Commission's action be ripe for judicial review.

We have carefully considered plaintiffs' argument that it is unjust to deny them a review of the Commission's general revenue order at this time because this is their only opportunity to have it reviewed. They maintain that in a subsequent Section 13 specific rate proceeding, the Commission will not consider their objections to the procedures followed in the prior general revenue proceeding and hence that they will be forever foreclosed from obtaining a judicial determination of the merits of the claims which they now assert. By way of justification of their fears, they cite *Koppers Co.* v. *Chesapeake & Ohio Ry.*, 303 I.C.C. 383 (1958), a proceeding before the Commission subsequent to the court's refusal to review the Commission's general revenue order in *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955), previously discussed. In the course of its opinion, the Commission said, with reference to the prior general revenue order:

> "Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." 303 I.C.C. 387.

We do not attempt, of course, to pass upon the propriety of this ruling of the Commission in the *Koppers* case. It is enough to say that in the case before us, we believe that plaintiffs' fears, however natural they may be under the circumstances, are unfounded. The general revenue order authorizing the overall increases is a necessary foundation or starting point for any subsequent determination of rates specifically applicable to plaintiffs. We see no reason why, upon making a proper record before the Commission in a Section 13 proceeding, plaintiffs cannot preserve the objections which they now assert to the procedure leading up to the general revenue order. We believe that an adverse ruling of the Commission on these objections should be reviewable by a court upon its review of the Commission's final order in the Section 13 proceeding. Although independent research by the court on this subject has revealed no decision directly in point, it is our view that an analogy may be found in cases involving the review of the Commission's order under Section 13(4) with regard to intrastate rates in which criticisms of a prior general order involving interstate rates were considered by the court.

See, e.g., Illinois Commerce Commission v. *United States*, 292 U.S. 474 (1934)
North Carolina v. *United States*, 325 U.S. 507 (1945)
Tennessee v. *United States*, 113 F. Supp. 634 (M.D. Tenn. 1953), *aff'd*, 346 U.S. 891 (1953)

In any event, we are satisfied, for the reasons previously mentioned, that the statute does not contemplate an attack upon the general revenue order at this stage.

The Commission's motion is granted. The action is dismissed for failure to state a claim.

So ordered.

Dated: October 28, 1969

IRVING R. KAUFMAN
U. S. C. J.

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Affidavit of Service

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

I, Sheila H. Marshall, an associate attorney in the firm of Messrs. LeBoeuf, Lamb, Leiby & MacRae, of which Cameron F. MacRae, Esq., attorney of record for Appellants herein is a partner, depose and say that on the 16th day of January, 1970, I served copies of the foregoing Jurisdictional Statement on the following, all of whom were parties to the action in the court below, by first class mail, postage prepaid.

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Sworn to before me
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Notary Public

No. 1283

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FILED
MAR 5 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

ALABAMA POWER COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

ALABAMA POWER COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Appellants, Alabama Power Company, American Paper Institute, Association of Home Applicance Manufacturers, Gas Appliance Manufacturers Association, Inc., Georgia Power Company, Gulf Power Company, Manufacturing Chemists' Association, Inc., Property Owners' Committee, Southern Electric Generating Company, Southern Paper Manufacturers Traffic Conference, and Steel Shipping Container Institute, appeal from the judgment of the United States District Court for the District of Columbia, entered on December 18, 1969, dismissing on jurisdictional grounds

switching charges at Bradford, Pa., of $18.26, $27.47, and $43.48 per car, respectively, for intraplant, interplant (apparently intraterminal), and interterminal switching. Respondents' evidence shows, however, that these charges cover only a little more than one-half of the average out-of-pocket costs in official territory for providing such switching services.

The board of trade of the city of Chicago objects to increases in the switching charges on grain in that area. The charges, stated in cents per 100 pounds, are at a level where the 6-percent increase is rounded to 1 cent, producing a percentage increase in the switching rate of about 9 percent. This protestant contends that a percentage increase in the type of switching charges maintained at Chicago places a greater per-car increase on the heavier loading commodities and that on a car weighing in excess of 50 tons, the charge would be from 200 to over 300 percent of the out-of-pocket costs. Not all commodities, however, are heavy loading. The protestant also asserts that the switching charges have increased about 60 percent since 1958, whereas the "BLS" consumer price index relied upon by the respondents increased only 17 percent in the same period. In *Switching Rates in Chicago Switching District,* 177 I.C.C. 669 (1931) and later reports, the Commission prescribed the maximum switching rates on all commodities in the Chicago switching area. The present switching charges are on the prescribed basis increased as authorized in other general revenue proceedings and reflect the complicated switching situation at Chicago.

The Granite City Steel Company notes that at East St. Louis, Ill., the switching charges were increased between 4.2 and 18.5 percent in Ex Parte No. 256, and that the additional increases involved herein would extend the increase to between 10.4 and 25.9 percent above the pre-Ex Parte No. 256 level. East St. Louis is a border point assigned the eastern territory increase in Ex Parte No. 256, whereas switching charges in southern territory were not increased and those in western territory were only increased one-half the amount of the flat increase in eastern territory. This protestant seeks to have the proposed increases in switching charges at the East St. Louis switching district canceled to remove a part of the alleged prejudicial treatment suffered by that district under Ex Parte No. 256. While the railroads have often accorded different rate treatment to border points than to interior points, it is not feasible to revise individual rate adjustments in this general revenue proceeding, nor is there evidence sufficient to find the proposed increases at East St. Louis unlawful.

The Institute of Scrap Iron and Steel urges that the proposed increases will further hamper the rail movement of iron and steel scrap. Unregulated motor carriers now transport iron and steel scrap to the processing yards, from which it is sent to dockside for export or to mills for further processing. In order to dispose of the vast amount of iron and steel scrap some of it must be exported. However, the market is depressed and the protestant argues that increased switching charges will encourage foreign users to obtain their needs elsewhere or to switch to iron ore. The respondents' switching costs at the ports have increased the same as at other points, and the railroads cannot be expected to transport export traffic at less than out-of-pocket costs. No reason is shown why the iron and steel scrap industry should be excused from bearing a part of the increases in rail costs.

In view of the evidence of record, we conclude that the increases proposed in switching charges are just and reasonable and not shown to be unlawful.

Transit.—Respondents propose to increase their transit charges 6 percent and, except in eastern territory, to make the increase subject to a minimum of $3 a car. At most stations in western and southern territories, the minimum transit charge when published per car is to be increased 6 percent, minimum $3 per car. The charge for stopping carload shipments in transit to partially load or unload is to be increased $3 per stop in southern (except for TOFC service and transloading) and western territories. At all other points a 6-percent increase is proposed.

The increases in transit charges are opposed by many interests, including the sugar, flour, edible oil, foodstuffs, rag, and waste industries. The Northern Ohio Sugar Company processes sugar in the last quarter of each year, and in order to supply its customers on a regular basis, places large quantities of sugar in public storage. The transit charge of 6.5 cents per 100 pounds, established about 2 years ago would become 7 cents under the proposed increase. This protestant claims that the increases are forcing it to build storage facilities at its factories and to discontinue public storage, which could divert traffic from the railroads.

The Pillsbury Company ships grain and flour by carloads into its warehouses and mixed carloads of grain or flour and foodstuffs from those warehouses. The grain rates include transit, but the foodstuffs rates are subject to transit charges, which vary according to the mixture in the car. The $3 minimum transit charge would apply on the foodstuffs in these mixed shipments and could

produce a percentage increase of as much as 61 percent in some instances. Without the transit service, however, the foodstuffs would be charged higher less-than-carload rates.

Franklin Bros. & Co., Inc., which ships rags and textile waste, argues that since in many cases the stopoff charges produce total transportation costs which exceed its margin of profit from the lading, in many instances the traffic will be lost to the railroads. It also asserts that its export shipments of textile waste material through the port of New York, have fallen off because its prices, which must include the extra charges, are not in line with those of foreign competitors. Several protestants object to increases in transit charges on traffic going through the ports. The members of the Western Petroleum Refiners' Association would have to pay the increased charges at the ports, whereas their competitors located on the waterfront would not have to pay for these services. General Foods Corporation argues that an increase in the split delivery charge of 5 cents per 100 pounds, minimum $1, at Philadelphia, Pa., on imported cocoa beans is inequitable and unreasonable. Virginia State Ports Authority opposes increases in waterborne charges.

A number of special service charges would be increased 6 percent. The Lukens Steel Company objects to increases in addition to those permitted in Ex Parte No. 256, *supra*. The United States Department of Agriculture opposes the increases in charges for supplying grain doors, and for holding cars of grain for inspection and disposition orders. The holding and inspection charge is not applicable at all stations. The board of trade of the city of Chicago objects to the increases in charges (1) for inspecting grain held on inspection tracks after the expiration of free time, and (2) for diversion and reconsignment charge increase. The protestants assert that the increases have not been justified, or result in charges which are out of line with those at other points.

The out-of-pocket costs of providing transit services have increased. In eastern territory, for instance, they were $68.96 as of April 1, 1967 and $72.36 as of January 1, 1968, representing an increase of about 5 percent. The stopping-in-transit charges increased about 5.7 percent in that territory during the same period. Since transit charges as increased will still cover the costs of providing the service, the proposed increases appear to be within the zone of reasonableness.

Minimum line-haul revenue.—In Ex Parte No. 256 the eastern carriers were authorized to increase by one-third the minimum

net line-haul revenue they must receive before absorbing any portion of switching charges. As so increased the minimum amounts ranged generally between $60 and $67 per car. No increases, however, were authorized at St. Louis, Mo. and East St. Louis, Ill., where they were opposed by Granite City Steel Company, and where minimum net line-haul revenue requirements of $49.83 for single-line and $62.74 for joint-line services had recently been established.[1]

Southern territory carriers withdrew from the proposal in Ex Parte No. 256; but they now propose to increase their minimum revenue requirement by one-third at southern territory points and at certain Mississippi River crossings, including St. Louis and East St. Louis. At other points, respondents propose an increase of 6 percent. Granite City Steel Company again opposes the increases at St. Louis and East St. Louis, contending that increases in excess of 6 percent would be out of line and excessive. Respondents argue that in Ex Parte No. 256 we acceded to this protestant's request by treating St. Louis and East St. Louis the same as southern territory; that protestant had made an election to this effect; and that, to be consistent, these points should be given the proposed southern territory increase of 33 1/3 percent. We do not consider such argument as justification for higher percentage increases in minimum requirements at St. Louis and East St. Louis than elsewhere in the East. On the other hand, the record affords no factual basis for exact equalization of such minimum requirements. In the circumstances, therefore, we shall limit our authorization in this proceeding to an increase of 6 percent at St. Louis and East St. Louis, leaving respondents free subsequently to publish such further modification as they are prepared to justify.

Except as above noted, absent opposing evidence, we find the proposed increases in minimum line-haul revenue requirements justified.

Train service and detention charges.—Westinghouse Electric Corporation, National Electrical Manufacturers Association, and Hydraulic Turbine Manufacturers, in behalf of their members, oppose a 6-percent increase in the special train service charge. Because of the large size and heavy weight of transformers and other commodities which they ship, these protestants often find it necessary to use special train service, the charge for which is in addition to all other charges. In July 1965 the charge was increased from $7.35 to $8.50 per mile. In Ex Parte No. 256, the

[1] See 329 I.C.C. 854, 950.

charge was increased to $8.93 or $9.35 per mile, depending upon the territory. In support of the 6-percent increase the respondents state that at times, because of weight or dimensions, a complete train crew and the necessary motive power are required to handle a particular shipment. On occasion such trains must move over circuitous routes and at reduced speeds. These same protestants oppose the 6-percent increase in the use and detention charges on the heavy flatcars, which are used by electrical manufacturers to move their large, heavy commodities. Demurrage or detention charges applicable to all other types of cars are excluded from the increases in this proceeding. Use and detention charges on heavy-duty flatcars were increased effective June 16, 1968 by 5 and 10 percent but were not otherwise increased in Ex Parte No. 256. The respondents point out that these cars are expensive and, although in continuous use, are underutilized from an annual mileage standpoint. The use charge is to compensate the respondents for unusually high investments for special rail equipment. But the protestants argue that, as the investment is fixed, it is being offset by the present charge and there is no justification to increase it. However, replacement costs are constantly increasing; a 700,000-pound car which cost $93,695 in 1961 would cost about $123,000 to replace in 1968. The detention and demurrage charges can be avoided by the prompt release of the heavy-duty flatcars. No reason appears why these services should not bear a portion of the revenue requirements.

Coal.—Bituminous coal is the largest single commodity handled by class I railroads. In 1967, it comprised 24.83 percent of all tons carried and 26.78 percent of all tons originated. Revenue from this traffic constituted 11.91 percent of revenue received on all freight. The respondents estimate that the proposed increase on coal will produce $48 million annually in additional revenues.

In the East, including the Pocahontas region, bituminous coal constituted 38.37 percent of all freight carried in 1967, and 44.18 percent of all freight originated. The greater part of the movement in this area is by rail and it is estimated that the proposed increases will produce increased revenues of about $36 million annually for class I carriers. In 1967, over 68 percent of the bituminous coal produced in the United States moved from origin by rail. Total annual production since 1950 has varied between 390 million tons and 550 million tons, and between 68 and 76 percent has moved by rail. During that period, the average rail rate fluctuated between $3 and $3.58 per ton. These average figures

include the rates charged on the numerous volume, unit train, and trainload arrangements which have become more and more common in recent years.

The respondents propose to increase their rates on bituminous coal (including export coal), anthracite, coke, coal briquets, and petroleum coke briquets 5 percent, maximum 15 cents per ton. On lignite coal and lignite coke the maximum is 7.5 cents. The proposed schedules provide for the usual limitations and provisions for a single increase on coal moving, for example, rail-ocean-rail, and rail-river-rail, and on lake-cargo coal moving beyond the upper Great Lakes docks to interior destinations (8 cents per ton on the first rail leg and 7 cents per ton on the second rail leg). Charges for handling and transferring of coal at lower lake docks are proposed to be increased 6 percent. No increase is proposed in the dumping charges at Hampton Roads, Va., in connection with export coal. The proposed increases are estimated to average about 4.2 percent.

The National Coal Association, other associations, and numerous coal producers, electric utilities, and steel manufacturers, oppose the increases on bituminous coal and on accessorial charges where applicable to coal. It is contended that the proposed increases will result in reduced revenues due to replacement of coal by competitive forms of energy and the diversion of coal traffic to nonrail forms of transportation.

Coal in the East is faced with severe competition from imported residual fuel oil. In 1966, imported oil amounted to 358 million barrels, or the equivalent of about 86 million tons of coal. Residual fuel oil has displaced bituminous coal at 3 major utilities in the East. While displacement was not systemwide, residual fuel oil displaced bituminous coal at 12 plants which burned 3.7 million tons in 1966 before converting. The protestants also contend that coal pipelines and mine-mouth generating plants constitute a serious threat to rail movement of coal in eastern territory. It is argued that the proposed increases will greatly influence the future planning of utility companies with respect to construction of plants adapted to the use of other types of fuel, such as nuclear energy, oil, and gas. Some of the protestants' existing plants are equipped to burn either coal or gas and further increases in the delivered cost of coal, it is asserted, would induce conversion of other plants. According to protestants, during the period 1965-67 electric generating companies placed orders for nuclear plants aggregating about 30 million kilowatts, which

will displace approximately 85 million tons of coal. They state that the precise cost of generating electricity at large nuclear stations, in the 1 million kilowatt range is unknown, but that even if these plants work as expected, bituminous coal should be kept competitive. It is their view that the cost of nuclear fuel may rise in the future as a result of the shortage of uranium, but that utility executives have been inclined to follow the optimistic projections of the Atomic Energy Commission. They assert that, in some situations, nuclear power was chosen over coal, even though the latter had an edge from a cost standpoint, because of the fear that governmental restrictions on sulfur emissions would require expensive corrective measures. However, progress has been made to overcome this problem and the protestants expect that coal's handicap will be reduced substantially within a few years.

It is also asserted that the proposed increases will nullify, in effect, the volume rates which were established after detailed negotiations with various utility companies leading to operational innovations and substantial economies to the carriers. To secure reduced volume rates, the protestants accepted such tariff limitations as restricted turnaround time, minimum number of cars per train, placement time limits for unloading, weighing of the coal by the utility, enlarged trackage at receiving stations, the purchase and use of special unloading equipment, and the payment of freight bills on an expedited basis from unloading reports. The protestants argue that the proposed increases violate the spirit and understanding of the negotiations that led to the establishment of these volume coal rates and that such increases will effectively undermine the integrity of all rates negotiated in good faith.

Southeastern protestants contend that, since the railroads serving this area are among the most prosperous carriers in the Nation, their request for additional revenue is totally unjustified. A cost study was presented by these protestants which indicated that the rates presently in effect provided the involved railroads in excess of $20 million per year in revenue contribution above out-of-pocket costs. While the average rate of return of all class I railroads in 1967 was 2.45 percent, the principal coal-carrying railroads serving the Southeast had rates of return of over 5 percent in 1966 and 1967. But such a rate of return cannot be said to be excessive when low-risk capital, such as government, municipal, and high-grade corporate bonds are currently returning

better than 6 percent. Moreover, as we have long recognized, in general revenue proceedings, the needs of the group rather than individual lines must control. See *General Commodity Rate Increases, 1937*, 223 I.C.C. 657, 744.

These protestants also assert that little or no increase was applied after the Ex Parte No. 256 proceeding on coal moving under section 22 rates to the Tennessee Valley Authority, with which they compete; that the railroads would have received over $3 million in added revenue if the increases had been applied to those rates; and that it is highly inequitable to subject their coal traffic to substantial increases while excusing their competitor from making any additional contribution to the railroads. This is not a matter appropriate for consideration in this proceeding.

Coal moving to upper lake ports and to Canada meets competition from natural gas and substantial rate reductions have been made in recent years to counter loss of traffic. In 1958, a blanket reduction of 30 cents per ton was made, followed in the period 1960-65 with a number of specific reductions to particular destinations, ranging from 13 cents to 37 1/2 cents. In 1964, rates on coal moving to points in Ontario were reduced by from 30 to 60 cents per net ton. In June 1968, a reduction of 40 cents per ton was made in the rail-lake transportation charges to meet the competition of lignite moving from Canada. In recent years the Penn Central, Bessemer and Lake Erie, and Norfolk and Western have spent in excess of $30 million in improving storage and transfer facilities at lower Great Lakes ports to handle the lake-cargo movement of coal.

Statistics furnished by the protestants indicate that coal moving via rail-lake transportation from United States origins to all destinations in the United States has increased from 38,210,000 tons in 1963 to 40,636,000 tons in 1966. The Lake Carriers Association and the Upper Lake Docks Coal Bureau, Inc., seek elimination of the increase or limitation thereof insofar as lake-cargo coal is involved, asserting that particular problems are encountered due to the movement by different transportation methods. Attention is called to instances of diversion from vessel to rail movement following the introduction of trainload rates. The respondents, however, assert that the reduced rail rates were made necessary by the threatened loss of the traffic as a result of competing fuels. The water carriers refer to the reduction in tonnage handled by them between 1965 and 1966 in movements to Michigan, Wisconsin, New York, Minnesota, and Indiana, and ar-

gue that if the full increase is applied it will be impossible for them to increase their rates to meet their cost increases. Substantially similar contentions were made in Ex Parte No. 223 and in Ex Parte No. 256. Within the scope of the issues in a general revenue proceeding, we find no basis shown for denying the proposed increase on coal moving to lower lake ports.

A substantial tonnage moves from United States ports on the lakes to Canada for fuel and metallurgical uses. The parties disagree as to the extent to which United States vessels participate in the latter movement, the protestant vessel owners asserting that such coal moves almost exclusively in Canadian vessels. Dealers in bituminous fuel coal in Canada stress the competition of natural gas and oil in their marketing territory, as do also the receivers in upper Michigan, Wisconsin, and Minnesota. The competitive conditions in these areas are comparable to those encountered by users of coal throughout the United States, and no reason appears why lake-cargo coal should be exempted from the increases.

Protestant steel manufacturers assert that their raw materials move under more favorable circumstances and conditions than almost any other group of commodities and that such favorable transportation characteristics should be accorded substantial weight in the Commission's consideration of the propriety of the proposed increases. These raw materials, they contend, move to protestants' plants in multiple car or trainload quantities, are loaded to heavy average carload weights, are handled in regular movements from a limited number of origins to a limited number of destinations requiring relatively little switching and relatively few interchanges, and the cost of transportation, therefore, is relatively low. According to protestants, unit cost trends since 1960 have been generally declining and the trend in contribution to revenues over and above out-of-pocket costs has been rising, resulting in a disproportionate share of carrier revenue requirements being assessed against these commodities. A cost analysis was presented which indicates that the contribution to the railroads' constant costs and profits made by metallurgical coal during the period 1961-67 increased from $25.4 million to $32.6 million—a gain of over 28 percent.

Generally, steel manufacturers assert that the steel industry is contributing more than its share of the railroads' revenue requirements. Their calculations indicate that revenue from metallurgical coal movements exceeds out-of-pocket costs of the move-

ments by greater percentages in 1967 than in earlier years. The more significant comparison, however, is between the amount of service performed and the revenue received therefor. Thus, statistics which include steel industry raw materials as a group (bituminous coal, iron ore, coke, and fluxing stone) show that in the period 1950-66, tons transported by eastern railroads for the eastern steel industry constituted 21 percent of all tons carried and 18 percent of all ton-miles but produced only 12 to 13 percent of total freight revenues. Between 1950 and 1967, in the southern region, bituminous coal constituted between 23 and 26 percent of total tons carried, and produced between 13 and 15 percent of total revenue.

It is also urged that domestic steel manufacturers encounter severe competition from imported steel and cannot bear further increases in raw material costs. Problems in international competition cannot, however, be solved by regulatory limitation on otherwise valid rate increases of service industries.

The Federal Interagency Committee on Coal Exports, composed of representatives of the Treasury, State, Interior, and Commerce Departments of the United States, the Coal Exporters Association of the United States, Inc., representatives of the Japanese Steel Industry, and Japanese Importers and Exporters of coal, oppose the proposed increases on export coal. The committee is primarily concerned with the allegedly adverse effects the proposed increases will have on the Nation's international balance of payments situation, which at the present time is in a deficit position. It is also concerned with the impact the proposal will have on both local and national economies.

Coal exports have made a major contribution to the balance of payments running close to $500 million a year and continuation of these trade earnings is of great importance to the Nation. These protestants assert that the most influential factor in the maintenance of the present position of United States export coal in the international energy market is the delivered price of such coal at exit ports, and it is contended that any action which increases the delivered price of coal is competitively disadvantageous and inimical to the Nation's balance of payments.

The Japanese interests assert that a further increase in the price of American coking coal will compound the already serious balance of payments problem and will also encourage the large Japanese trading companies to further develop alternate sources of supply. They stress the competition American coal is facing from

Australia, western Canada, the U.S.S.R., Poland, and other countries and state that should the price difference between American coking coal and coal from other sources become greater, they would have to seriously consider cancellation of present long-term contracts.

Attention is also called to the losses in shipments of United States coal to European countries recently, particularly to Italy, the Netherlands, Belgium, and Luxembourg. While these are alleged to have resulted from increases in delivered prices of U.S. coal in 1967, other factors are admittedly involved, including the increasing availability of high-grade coking coal from West Germany, Poland, and the U.S.S.R. Prices of these competing coals are not based strictly on economic considerations and the increased exports from West Germany were made possible by subsidies on surplus coking coals which enabled the delivery of these coals in other countries below the listed f.o.b. mine prices. In addition, there was an overall decrease in demand for metallurgical coal. Increased competition from British coal is now being experienced as a result of the devaluation of the British pound. In some instances import quotas limit the extent of United States participation in foreign coal markets.

The protestants estimate that the increase on bituminous coal moving by rail to the ports, based on 1967 shipments of 34.5 million tons would total $5.1 million. It is argued that if as little as 1.2 million tons of export coal traffic were lost, it would offset the additional revenues sought by the carriers and would also mean a loss of $13.2 million to the U.S. balance of payments. In Ex Parte No. 256, the respondents did not apply the general increase on export coal, the justification, in part, being that it would serve the national interest because of the contribution of such traffic to the balance of payments, 329 I.C.C. 854, 934. In this proceeding the respondents expect no loss of export traffic and assert that, to the extent that the higher freight rates are borne by the foreign receiver, it will improve the balance of payments. In any event, our conclusions as to the lawfulness of the proposed increases cannot depend upon their collateral impact on the balance of payments. Additional operating revenues are needed by respondents and this traffic should bear its fair proportion of the burden.

Overseas exports of coal since 1959 have fluctuated yearly between 24 million and 34 million tons. Nearly 95 percent of this traffic moved through piers in the Hampton Roads area. At these

piers and at Baltimore, the railroads have made substantial improvements in the facilities and invested in numerous additional freight cars to handle the coal movement. The charge assessed by the railroads for dumping the coal into vessels at Hampton Roads, 4 1/2 cents per net ton, has not changed since 1910. No change is to be made under the present proposal. The volume of coal exported has declined in recent years notwithstanding that the rates have not been increased since 1960. The increase at that time was only 1.4 percent over the 1957 rate. Since no increase in rates on export coal was made under Ex Parte No. 256, the respondents assert that the increase here in issue will result in a rate level only 5.5 percent over the 1957 level. They point out that the greatly increased capacity of many new ocean vessels requires the accumulation of many more loaded cars, with consequent greater car detention and increased costs to the railroads.

While it appears true that any increase in the delivered price of coal will tend to reduce its competitive position in foreign markets, it cannot be found that the differences due to the rate increase here in issue are as significant as claimed, or that United States coal would not be underbid whether or not the increase is applied. There is evidence that the quality of United States coal is such as to make it desirable, if not necessary, and that long-term contracts covering some 15 years in the future have been made. Some contention is made with respect to differences in rates charged on export coal and those charged on coal moving to the piers for coastwise transportation. A general revenue proceeding, however, is not appropriate for determination of issues of relationships of this nature.

Generally the trainload rates increased as here proposed are at the level of single car rates of 16 to 20 years ago. To a number of electric utilities in the Northeast, the respondents show that the annual cost of the proposed increases would approximate less than 0.3 percent of the utilities' operating revenues.

The respondents do not share the views of most protestants that the proposed increases will result in diversion of rail coal to motor vehicle or barge, or to conversion of coal powered plants to oil or gas, or to increased use of mine-mouth generating plants and plants powered by nuclear energy. The respondents maintain that coal traffic, like all other traffic should bear a fair proportion of the needed increased revenues. To the extent that specific instances appear where rate reductions are needed to counter real traffic losses, they say adjustments will be made.

There is evidence that the construction costs of nuclear-powered plants have risen appreciably and some doubts exist as to the future investments necessary to produce high-capacity plants of this type. Costs of other forms of transportation, and of competing fuels are also increasing. Technological improvements, and the ability of electric power producers to connect power lines so as to utilize the most economical sources of supply provides no basis for excluding coal from sharing in the increased costs of transportation.

The evidence is not convincing that freight rates on bituminous coal are a major factor in decisions to invest in nuclear powered plants. We are not persuaded that the rate increases here proposed will materially influence decisions to be made as to the establishment of mine-mouth electric generating plants. While the alternate use of coal, gas, or oil, according as price and availability dictate, will probably be influenced to some extent by any change in the price of delivered fuel, prices of competing fuels are also subject to cost increases. Should competitive situations arise, appropriate adjustments can be made by producers and carriers. That conditions exist which permit such situations to develop furnishes no ground for exempting coal from bearing an appropriate proportion of the increased revenues shown necessary.

Iron ore.– The railroads propose to increase their line-haul rates on iron ore (including pellets) 5 percent, maximum 20 cents per ton. The charges for handling iron ore at upper and lower Great Lakes ports are proposed to be increased 6 percent except that no increase is proposed for handling iron ore (not ground or hydrated) or iron ore sinter from hold to rail of vessel at lower lake ports. They also propose to increase by 6 percent the charges for ground or dock storage of ores at Lake Erie ports.

Iron ore is an important commodity to the respondents, both from a tonnage and a revenue standpoint. In 1967, class I railroads in the United States originated 92.8 million gross tons of iron ore, from which they received total revenue of $204.5 million, and average revenue per gross ton of $2.20. In 1967, class I railroads in the eastern district, including the Pocahontas region, terminated 46.5 million gross tons, from which they derived revenue of $109 million, an average per gross ton of $2.35. The tonnage of iron ore carried by all class I railroads in 1967 was 6.05 percent of the total freight carried and the revenue therefrom represented 2.24 percent of the total freight revenue. The tonnage

of iron ore transported by the eastern district railroads in 1967 was 6.28 percent of all freight tonnage and produced 3.16 percent of the revenue received from all freight.

The principal iron ore movement within eastern territory is ex-lake iron ore from lower Lake Erie ports to steel mills south thereof. Other important movements are the import movements from the eastern seaboard and movements from mines within eastern territory. It is estimated that the proposed increases will produce approximately $6 million for the eastern railroads on an annual basis and will reflect an average rate increase of approximately 4.8 percent.

The proposed increases within eastern territory are opposed by numerous steel companies which contend that the present rates on iron ore are excessive and that any further increase cannot be justified. No specific reference is made to the rates on imported iron ore nor to the level of the all-rail rates wholly within eastern territory. Objection is made to the increase in the rates on ex-lake iron ore from Cleveland, Ohio, to Weirton, W. Va., on the grounds that the existing rates do not reflect the highly favorable transportation conditions and disproportionately high net revenues from this low-grade commodity. Most iron ore received at Weirton comes from two sources, the Michigan-Minnesota ranges and Labrador. It is claimed that the present volume rates as increased under Ex Parte No. 256 yield revenue per gross ton-mile of 19.8 mills on the Lake Superior ore and 20.3 mills on the Labrador ore. The proposed increases would increase these earnings to 20.8 and 21.2 mills per gross ton-mile, respectively.

The respondents compare the single-car rates approved by the Commission in Ex Parte No. 223 (Sub-No. 3) *Increased Rates On Iron Ore*, 313 I.C.C. 549, with the present volume rates. In Ex Parte No. 223 we noted that the ex-lake iron ore movement reflected volume transportation conditions. The ex-lake iron ore rate to Weirton at the Ex Parte No. 223 level is $2.39 per gross ton on both the Lake Superior and Labrador ores. The present volume rates on iron ore traffic which include the increases under Ex Parte No. 256, are $2.24 on traffic receiving a prior regulated movement by common carrier within the United States and $2.29 when such movement has not occurred. Under the proposed increases these volume rates will become $2.35 and $2.40, respectively. The former is 4 cents under and the latter is 1 cent over the level of the rates found not to exceed the maximum of reasonableness 7 years ago.

close a need for additional revenues which can be met only if iron ore, which comprises a substantial portion of their tonnage, contributes to their revenue requirements. They take the position that the Commission should consider the revenue needs of all the carriers in making its evaluation of the sought increases, but that, in any event, whether the revenue needs are considered from the standpoint of the Minnesota carriers, the upper lake region carriers as a group, or the western district carriers as a whole, the proposed increases on iron ore are vitally and urgently needed.

In 1967, the four Minnesota ore-carrying railroads transported over 28 million tons of iron ore from the Minnesota ranges to the upper lake docks. DM&IR handled 58.1 percent of the shipments, GN 39.3 percent, NP 1.5 percent, and Soo Line 1.1 percent. DM&IR derives over 90 percent of its tonnage and 80 percent of its freight revenues from iron ore. Respondents assert that while DM&IR was considered a relatively prosperous carrier in the early 1950's, its rate of return has been generally low since 1955, averaging 3.73 percent in the period 1956-60, 3.39 percent from 1961 to 1965, an increase to 6.71 percent in 1966 and a decline to 4.30 percent in 1967.

Third-quarter earnings of the DM&IR for 1968 are below those for 1967, and 9-month earnings in 1968 approximate those for 1967. Its forecast for the calendar year 1968, with the authorized 3 percent interim increase, indicated a rate of return of 4.20 percent. For the constructive year, based upon the estimated 1968 level of traffic and with the full increases sought, the rate of return would be 4.59 percent. Dock tonnage through August 1968 exceeded that for the same period in 1967 by approximately 123,000 tons. However, the respondents insist that the total remains substantially below the original forecast of a 1,151,000 ton increase in dock tonnage in 1968 over 1967, upon which the rate of return of 4.20 percent for the calendar year 1968 was predicated.

Great Northern's rate of return of 2.08 percent in 1967 was the lowest in the last 17 years. With the interim increases authorized, its rate of return for the calendar year 1968 is estimated at 2.96 percent and with the full increases sought, its rate of return for the constructive year would be 3.39 percent. Its net railway operating income for the first 9 months of 1968 barely equaled that for the same period in 1967. Through August 1968, GN handled 8.2 million gross tons of iron ore over its Superior dock compared to 7.3 million gross tons during the same period in 1967. It predicted, however, a decline in pellet movement in the latter

Opposition to the increases in iron ore rates in western territory is directed primarily to the movement from the Lake Superior region and, more particularly, to the movement to the upper lake ports. The latter movement, in 1967, exceeded 42 million tons, of which two-thirds moved from Minnesota origins and one-third moved from Michigan origins. In addition, there is an all-rail movement in western territory from the Lake Superior region ranges and a substantial all-rail movement from other origins in that territory.

The seven common carrier railroads which transport iron ore from the Lake Superior district to the upper lake ports are: Chicago and North Western Railway Company (CNW); Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee); Duluth, Missabe and Iron Range Railway Company (DM&IR); Great Northern Railway Company (GN); Lake Superior & Ishpeming Railway Company (LS&I); Northern Pacific Railway Company (NP); and Soo Line Railroad Company (Soo Line). These carriers propose to apply the full 5-percent increase, maximum 20 cents per gross ton, on all-rail iron ore, including pellets, moving from that region. The four Minnesota ore-carrying railroads (DM&IR, GN, NP, and Soo Line) seek the full increase on iron ore and iron ore pellets moving from Minnesota ranges to upper lake docks, as well as to all-rail destinations. They also seek the 6-percent increase in dock handling charges at upper lake ports. However, the Michigan ore-carrying railroads, (CNW, Milwaukee, LS&I and Soo Line)[2] do not propose to take the proposed increases on iron ore moving from Michigan ranges to upper lake docks in Michigan.

In 1967, iron ore comprised 25.6 percent of the total tons carried and 5.6 percent of the total gross freight revenues of the seven upper lake carriers. The gross freight revenue derived from the movement of iron ore by all western district carriers in 1967 was slightly over $87 million, of which $55.5 million or 64 percent accrued to the upper lake carriers.

The respondents refer to the decline in rates of return of the seven upper lake carriers as evidence of the need for additional revenues. The average rate of return for these seven carriers was 3.37 percent in 1966 and dropped to 1.31 percent in 1967. This is compared with declines of from 4.03 percent to 2.75 percent for western district railroads and from 3.90 percent to 2.46 percent for all class I railroads in the United States. The respondents contend that the present earnings trends of both the upper lake ore carriers and the western district carriers as a whole, dis-

[2] The Soo Line serves both the Minnesota and Michigan ranges.

part of 1968 because of the shutdown of a pellet plant and that its total 1968 ore tonnage would approximate that for 1967.

In support of the reasonableness of the proposed increased rates, the respondents point out that the 1939 level of iron ore rates from the Missabe Range to upper lake ports found reasonable in *Butler Bros.* v. *Great Northern Ry. Co.*, 276 I.C.C. 679, has borne an aggregate increase of only 68.1 percent while the same iron ore moving beyond lower lake ports has borne an aggregate increase of 128.1 percent and other commodities moving in the West have borne increases ranging from 106 to 131 percent. They also point to reductions recently made from the normal level of upper lake iron ore rates in cases where the railway company is not required to perform certain switching services at origins or at upper lake docks, and on new movements at annual volume minima. Great Northern has invested $6 million and DM&IR $5 million in new pellet loading and unloading facilities to accommodate this movement. Additionally, respondents show that the rail charges of the Canadian National Railway Company on iron ore from the Steep Rock Mining District in Ontario to its upper lake dock at Port Arthur, Ontario, for transshipment by lake vessels, are substantially higher than those to United States upper lake ports for comparable hauls. Also from eastern Canadian producing origins, the rates, including agreed charges, are likewise substantially higher than upper lake rates on iron ore, including pellets.

The protestants maintain that of the total tonnage of iron ore moving to Great Lakes destinations, the percentage moving from Minnesota docks has been steadily declining. From a high of 43.2 million tons and 58.9 percent of the total shipments of iron ore into the Great Lakes in 1960, Minnesota railroad dock shipments in 1967 declined to 28.3 million tons and 35 percent of the total Great Lakes shipments. While Minnesota dock shipments continue to decline, Canadian and other foreign ores are increasing their share of the market. In 1960, 3.7 million tons of Canadian iron ore was shipped over Canadian docks in the Lake Superior district, compared to 4.9 million tons in 1967. Eastern Canada and other foreign sources shipped 3.6 million tons into the Great Lakes area in 1960 and in 1967 such tonnage had increased to 14.6 million tons, representing 18.1 percent of the total market. In rebuttal, respondents show that in 1966 protestants shipped 33 million tons of iron ore from foreign sources as opposed to only 14 million tons from Michigan and 18 million tons from Minnesota.

The protestants also claim that producing areas in West Africa, Australia, and South Africa are major sources of foreign competition. However, the record indicates that neither French nor British West Africa have exported iron ore to the United States since 1960; no iron ore has been imported from South Africa in the last 3 years; Australian ore exported to the United States in 1967 amounted to only 1,023 tons; and the 3 million tons of Liberian ore shipped to the United States in 1967 was 10 percent less than the 1966 tonnage.

Respondents assert that the proposed increases were arrived at after foreign competition was taken into consideration. The combined effect of the increases in iron ore rates approved in Ex Parte No. 256 and those proposed herein, they urge, equalizes the treatment of Lake Superior iron ore and foreign import ore and continues the railroads' policy of keeping the increases on Lake Superior region iron ore competitive with increases on import iron ore. For example, they show that to Pittsburgh, Pa., import iron ore would be increased to a total of 30 cents and Minnesota iron ore would also be increased to 30 cents for direct shipping ore and 29 cents for iron ore pellets. Respondents' comparisons are of line-haul rates only, due to their inability to obtain the contract dock handling charges made on import ore at Atlantic ports.

Protestants regard as negligible the small tonnages handled by the NP and Soo Line in 1967 and argue that for all practical purposes the DM&IR and GN, which together handled 97.4 percent of the traffic in 1967, are the only railroads transporting iron ore from the Lake Superior region to upper lake ports that would participate in any increased revenues derived from these movements. They contend that the financial condition of the DM&IR and GN clearly establishes that increases in the line-haul rates and dock handling charges on iron ore from the Minnesota mines to the upper lake ports are not justified. They also point out that the DM&IR is a wholly owned subsidiary of the United States Steel Corporation, the principal shipper over that railroad and a principal competitor of protestants. While, as previously indicated, the financial position of the DM&IR appears to be somewhat better than that of the GN, the current rates of return for these carriers cannot be described as excessive. Furthermore, we must also consider the revenue needs of the NP and Soo Line, which also participate in this traffic. We have repeatedly held that it would be unfair to deny needed increases in revenue on iron ore on the ground that some of the carriers participating in the traffic might

not need them. *Increased Freight Rates, 1958*, 302 I.C.C. 665, 689; 304 I.C.C. 289, 332; *Increased Freight Rates, 1967*, 329 I.C.C. 854, 929. The record in this proceeding shows that all of the Minnesota ore carriers are in need of the proposed increases on this traffic.

Nor does the fact that the Michigan ore carriers have flagged out of the proposed increases constitute grounds for denying the proposed increases to the Minnesota ore carriers. The record indicates that the Michigan carriers joined in the publication of the proposed increases but subsequently decided to forego them because of carrier competition. It may be that an increase in the rates from the Minnesota mines and not from the Michigan mines will have competitive ramifications and alter previously existing relationships; but that fact, however, is insufficient to deny the Minnesota iron ore carriers the proposed increase.

The record also indicates that much of the Canadian iron ore competition is provided by protestants themselves and that 13.8 million tons, shipped from the Michigan mines in 1967, was also shipped by protestants. As to the contention that the proposed increases will enhance competition from two private rail carriers serving pellet plants in Minnesota, it is reasonable to conclude that such carriers have had and will have cost increases the same as the respondents.

The upper lake dockage and handling charges are proposed to be increased 6 percent. The 19.5 cents per gross ton charge at Duluth and Superior, considered typical, would be increased by 1.5 cents. No increase was sought in these charges in Ex Parte No. 223; and in Ex Parte No. 256 an increase of only 1/2 cent or 2.5 percent was sought. In view of the increased operating costs experienced by the railroads in the intervening years, the proposed increase of 6 percent does not appear to be excessive.

Arguments concerning the alleged difficulties in the clerical or administrative handling of refunds of ore charges established in Ex Parte No. 256 were considered and disposed of in that proceeding. Nothing is presented in this record to warrant a different conclusion.

Two upper lake iron ore producer-shippers oppose the proposed increases in the all-rail rates on iron ore from mines in Minnesota and Michigan to destinations in the Chicago, Ill., district and to Granite City, Ill., as well as those on iron ore pellets from Pilot Knob, Mo., to Granite City. In 1967, approximately 1.2 million tons of iron ore moved all-rail from Minnesota-Michigan mines to Indiana and Illinois and some 100,000 tons have moved from

Pilot Knob to Granite City since May 1968, when production of pellets at Pilot Knob began. The protestants contend that this traffic, unlike other all-rail iron ore traffic in the western district, is faced with intense competition from foreign ores and the competition of a Minnesota private rail carrier producer.

The all-rail rates from the Mighigan-Minnesota origins generally reflect economies incident to volume movements and are well below maximum levels; and the multiple-car rates from Pilot Knob to Granite City represent a substantial reduction under the single-car rates. The private rail carrier producer has costs that are subject to inflationary trends like those of the railroad respondents. The substantial increase in the all-rail movement from Minnesota-Michigan origins, from 435,000 tons in 1961, to over 1 million tons in 1967, indicates that the proposed increase will not appreciably slow the potential growth in the all-rail movement of iron ore.

An iron ore producer at Wabuska, Nev., opposes the proposed increase on the ground that any increase in the rail cost of moving its iron ore from its Nevada mine to Pittsburg, Calif., for export will increase substantially its overall cost and impair its ability to survive in the Japanese market because of Australian ores selling at a lower landed cost in Japan. All export ore, as well as domestic ore, is subject to the proposed increases. Export ore to Japan has increased in the last 10 years to a peak of 3.6 million tons, of which protestant's movement is about 10 percent. No persuasive reason has been shown for exempting export iron ore traffic from the proposed increase.

Based upon all the evidence of record, we conclude that the increases proposed in the rates on iron ore will not result in rates and charges which exceed maximum reasonable levels or will significantly divert the traffic to other means of transportation; and that the iron ore traffic can and should bear the proposed increases.

Pig iron, iron and steel scrap.—By our order entered November 25, 1968, we lifted the suspension of most of the tariff schedules under investigation and permitted the increased rates and charges to become effective; but, in view of the situation to be discussed next, we retained under suspension pending further consideration, master tariff item 845, pig iron, and iron and steel scrap. Rates on these commodities are proposed to be increased 25 cents per ton, net or gross, as rated, on rates not exceeding $8 per ton, and 5 percent on rates exceeding $8 per ton. This compares with the

increase of 5 percent, maximum 20 cents per ton, proposed on iron ores. In Ex Parte No. 256, we held that the competitive relationship between iron ore and iron and steel scrap for use in steel mills required that the increase on scrap not exceed that applied to ore. In the present case the respondents have argued that our findings in the prior case were erroneous and that no justification exists for requiring increases on scrap to be related to those on ore.

In Ex Parte No. 256, producers of pig iron did not present evidence respecting their position in this controversy. They have done so in the present case, however, and have shown, without apparent contradiction by respondents or other protestants, that pig iron does compete directly with scrap as input for steel furnaces. The respondents have, in this case and in prior increase cases, published similar increases on the two commodities. We agree that, in bearing some share of the needed additional revenues, these two commodities should be treated alike. Pig iron producers argue that, since pig iron was permitted to be increased in Ex Parte No. 256 to a greater extent than scrap, any increase allowed in this case should not result in a total increase on pig iron greater than the total increase on scrap produced by the Ex Parte No. 256 increase plus that permitted herein. These protestants did not, however, seek reconsideration of our order in Ex Parte No. 256 and it is manifestly impractical to review and attempt to revise past rate adjustments in this proceeding.

As in prior proceedings, the protestants call attention to the public interest in removal and utilization of scrap and the importance of maintaining a viable industry dedicated to this task. The commodity involved is that referred to as obsolete scrap, comprised of old automobiles, appliances, railroad equipment, demolition material, et cetera, which constitutes about 23 percent of total ferrous scrap consumption. The remainder is comprised of home scrap and prompt industrial scrap, produced within the steel mill and steel fabrication industries, which flows directly back into the steelmaking process. Obsolete scrap is purchased to supplement this supply as needed. The protestants assert that the obsolete scrap industry is depressed, with prices per ton at a very low level. The respondents contend, however, that between 1961 and 1966 there was a substantial increase in the amount of scrap moved by rail, that the price of scrap fluctuated considerably, and that no increase in rail rates were applied but, rather, a number of reductions were made. They argue that prices of obsolete scrap are

governed by the extent of activity in the steel industry and do not depend upon freight rates.

Pig iron producers, while objecting to any increase in rates, call attention to the intensive competition of scrap iron and the need for similarity of rate treatment. These protestants serve generally nonintegrated steel mills and foundries, which do not produce their own hot metal supply. Prices of pig iron are substantially higher per ton than scrap, which adds to their marketing problems. The industry is said to be suffering from a cost-price squeeze and a number of pig iron plants have discontinued operations, without replacement, in the last 15 years. The economic circumstances which these protestants encounter is not substantially different from those affecting the respondents and many other protestants. We find that both scrap iron and pig iron should bear some share of the additional revenue needs of the railroads.

In the steelmaking process both scrap iron and pig iron compete as major components of the charge in the furnace. Integrated steel producers supply their pig iron needs by manufacture within their own complex. The primary component of the charge in the blast furnace, which produces pig iron, is iron ore. A substitute for both pig iron and scrap is high grade iron ore which has been subjected to other processes which increase its iron content to well over 90 percent. Thus, while the rates on these various commodities are not necessarily related, we are of the opinion that, under current conditions, and where the issues involve the increase in contribution necessary to meet a revenue need, the burden should be imposed in substantially similar fashion. We find that the increases on pig iron and iron and steel scrap, item No. 845 of the master tariff, should not exceed those applied to iron ores, item 1060.

Semifinished iron and steel.—Rates on semifinished iron and steel are proposed to be increased 5 percent, minimum 2 cents per 100 pounds or 40 cents per ton, net or gross. Included are items such as billets, blooms, ingots, sheet, bars, slabs, slab breakdowns, skelp, and coiled rods. A number of processors and fabricators oppose the increase, asserting the possibility of diversion of traffic, and contending that the rates produce revenue well in excess of out-of-pocket costs. They also assert that any increase makes more difficult the problem of competing with imported commodities. Many reduced incentive rates have been provided for the movement of these commodities and the respondents contend that the substantial interplant movement of semifinished

steel is not dependent upon the transportation rates to the extent claimed by protestants. While the 2 cents per hundredweight minimum produces increases in excess of 5 percent on very short hauls, it reflects the recognized higher terminal costs which have greater impact on such movements. Generally rates for these commodities are at a low level, ranging from 7.2 percent to 12 percent of first class. The revenue per ton on semifinished steel in 1965 was lower than in 1950. The proposed increase is generally less than 1 percent of the sales price of finished steel and will not, in our opinion, have any significant impact on competition with imported products. We find the proposed increase on semifinished iron and steel just and reasonable.

Aluminum ores and products.—On aluminum ores, including bauxite and alumina, the increase proposed is 15 cents per ton, net or gross, as rated, up to and including $6.50 per ton and 25 cents per ton, net or gross, on rates above $6.50 per ton. On aluminum ingots, billets, pigs, other primary metal products, and mill products the increase proposed is 5 percent, minimum 2 cents per 100 pounds or 40 cents per ton, net or gross, as rated, and the increase proposed on aluminum foil is 5 percent, minimum 2 cents per 100 pounds.

It is the position of the aluminum industry that respondents have neither justified their need for a general revenue increase, nor have they proved that the proposed increases are reasonable and free from unjust discrimination, and undue preference or prejudice. The aluminum industry is one of wide plant dispersion which generates a heavy demand for long-haul transportation at all stages of the production process. Aluminum is a growth industry and, to support its continued growth, it must compete in many markets with other metals and especially with iron and steel. Aluminum is increasingly used as an alternate for steel in many markets, including the container market, where aluminum cans are being used for beer, frozen citrus concentrates, and motor oils. Iron and steel and aluminum are significant competitors. The protestants assert that the proposed general increase in the form of a percentage increase disrupts competitive relationships and will widen the rate differential between aluminum and steel.

The increases are opposed not only on the grounds of their inflationary effect, but also because those proposed for the aluminum industry are greater than for the iron and steel industry. In this regard it should be noted that the increases sought on aluminum products are the same as those sought on iron and steel products. As to the claim that respondents are discriminating in their

treatment of aluminum ore as compared with iron ore, transportation characteristics are substantially different. Iron ore moves in open-top cars in short hauls, whereas bauxite and alumina must be protected from moisture and are transported in covered hopper cars. No correlation has ever existed in the rate levels between alumina and iron ore. The fact that the sites chosen by the aluminum industry requires extensively long transportation hauls involve circumstances which are beyond the control of respondents. It is apparent that the rate structure has not hindered development. The aluminum industry has expanded sixfold since 1945.

The respondents are fully aware of the competitive problems confronting them. They have indicated that should the proposed increases place any particular movements in jeopardy, action to retain the rail movement will be taken. We find the proposed increases to be just and reasonable.

Copper products, lead and zinc ores and concentrates.—The copper producers oppose not only the proposed increases of 5 percent, minimum 2 cents per 100 pounds, or 40 cents per ton, net or gross, as rated, on primary copper smelter products, but all proposed increases on the grounds that respondents have neither shown an overall revenue need, nor have they justified with necessary cost-revenue comparisons, or otherwise, the varying increases proposed on different commodities. The movement of primary copper smelter products is substantially long-haul traffic at very high loadings and revenues and profits per car. On much of the traffic, a double haul is involved. Copper produced 183 percent more revenue per car in 1965 than the average of all carload traffic.

Cost-revenue comparisons submitted by the producers indicate that contributions averaged 40 percent above the contributions made by the average of all traffic. Based on projections of substantial growth, copper will be making even greater contributions in the future without any rate increase. It is contended that respondents have failed to consider the impact of the recent copper strike and its effect on copper producers who are now being asked to provide increased revenues for the railroads based upon the railroad claim of less favorable earnings during an abnormal period.

Current copper prices are no higher than those in effect in 1964. It is claimed that no evidence was submitted to rebut the showing of extremely high profitability per car or per ton being enjoyed by respondents on the present level of copper rates. It is further claimed that respondents have submitted no data showing that the

cost of service on primary copper smelter products had been increasing, and that the proposed increases thereon are totaly unrelated either to the cost of service or to the relative changes in cost of services resulting from alleged wage or price increases.

This group of protestants alleges that the proposed increases are inherently discriminatory, because different percentage increases are being placed on different commodities, all of which are receiving rail transportation from the same carriers.

The lead and zinc industries contend that the respondents have failed to justify their proposed increases on the basis of cost increases or revenue needs; that the increases proposed on lead and zinc are unjust and unreasonable because of import competition and a depressed price situation as well as the more favorable treatment accorded competitive metals; and that cost-revenue comparisons on lead and zinc show that these commodities are presently contributing more than a fair return to the respondents. The same increases as proposed on aluminum products are proposed on primary zinc and lead smelter products. However, unlike the stated increases proposed on aluminum ores, the proposed increases on zinc and lead ores and concentrates are 5 percent, except to, from, or within southern territory, where the increase proposed is 4 percent without a maximum, despite the fact that the Commission in previous increase proceedings held that holddowns were necessary for competitive reasons. See *Increased Freight Rates, 1951*, 284 I.C.C. 589, 656.

It is claimed that the lead and zinc industries are confronted with severe competition from imported metals. The prices of lead and zinc are set by the market. Thus, these industries cannot pass along either their own wage increases, or those proposed by respondents. The current price of lead is 1.5 cents per pound less than it was in 1967, and zinc is 0.34 of a cent less per pound. In view of the showing that the present rates on lead and zinc are yielding an above-average return, the protestants assert that the increases proposed on lead and zinc have not been justified.

We have previously made findings as to the overall general revenue needs of the respondents. The copper producers, while alleging discrimination, have not shown with any degree of specificity that the selective increases proposed will create either undue preference or undue prejudice. More than bare allegations of discrimination are needed to warrant condemning the increases found to be critically needed to offset, in part, the increased operating costs of respondents. Neither can the relatively low

costs and high revenue contributions shown by protestants, taken at face value, be used as a basis for condemning the proposed increases on nonferrous commodities. Such comparisons, standing alone, are an insufficient basis for finding that the proposed increases will result in rates that exceed a maximum reasonable level. As to the import competition referred to by the lead and zinc industries, respondents have indicated that, where warranted, adjustments will be made to protect their rail movements.

Ferro alloys and spelter.—The increase proposed on these commodities is 5 percent, minimum 40 cents per ton, net or gross, as rated. One of the protestants contends that the proposed increase applied on raw materials used in the manufacture of steel creates undue prejudice by placing a greater burden on such raw materials than on commodities generally, and by making higher rate levels for shorter hauls. It does not oppose a fair and equitable increase, but believes a fair increase should not exceed 3 percent. Another protestant objects to the 40-cent minimum because of its effect on short-haul movements and suggests that removal of the minimum would produce an equitable increase. Both protestants show that the proposed minimum on their short-haul movements results in a somewhat higher percentage than would be applied on long-haul movements. Aside from the mere allegation of discrimination, no evidence was submitted to show a violation of the act. Increased expenses fall most heavily on terminal services which make up a larger proportion of the cost of handling short-haul traffic. In the circumstances the proposed increase is found just and reasonable.

Nonferrous scrap.—The proposed increase on nonferrous scrap is 5 percent, minimum 1 cent per 100 pounds, or 25 cents per ton, net or gross, as rated. Protestants allege that the proposed increases are unjust and unreasonable, discriminatory and will be self-defeating in that the increases will reduce the scope of marketing areas, destroy the marginal, small dealer and divert rail movements to motor carriage. Nonferrous scrap materials shipped in quantity are mainly in competition with virgin metals. Nonferrous scrap has many favorable transportation statistics, including regular movement, favorable packaging, use of the same cars inbound and outbound thereby eliminating switching, heavy loading, and absence of need for special services. The present level of rates on scrap, without the proposed increases, they say, is amply compensatory.

There is a wide range in the prices of the various types of nonferrous scrap. A comparison of various catagories thereof, February 1963 with March 1968, indicates an average increase of 59.8 percent. Thereafter, prices have dropped but still remain at levels above those in March 1963. Seventy-five percent of the movement of nonferrous scrap was in official territory in 1966, for average hauls of 441 miles, and 1,180 miles, respectively, within, and from and to that territory. These relatively long average movements indicate that there is a widespread demand for scrap. Beginning in 1963 in official territory incentive rates were established on scrap with minimum weights ranging from 40,000 to 100,000 pounds. Within the South rates are subject to minimum weights of 40,000, 60,000, and 80,000 pounds. Presently nonferrous scrap is being handled at rate levels lower than those in effect in 1963.

Although protestants allege that the proposed increases will create discrimination, no probative evidence has been submitted to show undue preference or prejudice, or that the proposed increases, except as hereinafter provided, applied to the present level of rates, would result in rates exceeding a maximum reasonable basis. The proposed minimums of 1 cent per 100 pounds, or 25 cents per ton, net or gross, as rated, as set forth in item 840 of the master tariff, are patently inconsistent. The minimum which will be allowed will be 1 cent per 100 pounds, 20 cents per net ton, or 22 cents per gross ton.

Radioactive materials.—The 10-percent increase proposed on these commodities, which include irradiated fuel elements, uranium florides, oxides, and salts, and radioactive waste materials is opposed by the U. S. Atomic Energy Commission and the Westinghouse Electric Corporation. It is claimed that the stringent packing and safety requirements imposed on these commodities have resulted in a superior claim record and that in the event of a nuclear incident during transport the respondents under the Price-Anderson Act are provided substantial indemnity by the Government. It is further alleged that radioactive materials are in competition with coal and fuel oil, both of which are accorded lesser increases. Because of the extraordinary nature of this type of traffic, the handling of which requires unusual precautions to be taken, including the special cleaning of cars to prevent the possibility of contaminating other traffic, and in view of need shown for additional revenues, an increase greater than that accorded other traffic is warranted.

Farm products.—The United States Department of Agriculture, regulatory agencies of many States, and various organizations representing agricultural interests oppose increases on farm products, and on farm supplies such as fertilizers and animal and poultry feeds. Our attention is called to depressed conditions in agriculture, the constantly rising costs of supplies used by farmers, and the inability of the farmer to increase the prices received for his products. We recognize the problems faced by the agricultural community and the relatively low level of net farm earnings; but we must also recognize that a sound and adequate transportation industry is equally essential to the economy of the Nation, and, indeed, to the welfare of the farmer as well. Net realized income of farm operators increased from $10.7 billion in 1957 to $14.5 billion in 1967, while railroad net income in the same period declined from $737 million to $555 million. Between 1959 and 1967 the index of prices received by farmers increased only 4 percent but, on the other hand, the railroad freight rate index for farm products declined between 1959 and 1966 by 9 percent. If all increases are taken on farm products as proposed, the average level of rail rates will be lower than in 1959. We cannot accept, as a general proposition, that the agricultural industry should not contribute some portion of the needed additional revenues.

Grain, grain products, feed, and feed ingredients.—By our order entered November 25, 1968, we lifted the suspension of most of the tariff schedules under investigation and permitted the increased rates and charges to become effective. In view of the complexity of the grain rate structure and the diverse application of the proposed increases by the respondents, we retained under suspension pending further consideration, master tariff item 515, grain and certain grain products. Rate increases proposed on these commodities are generally 6 percent, except that within the West and the western part of Illinois Freight Association territory they are 7 percent, and to and within the South, excluding flour and meal, they are based on a scale reflecting about 5 percent.[3] The increases proposed on buckwheat, oat, rye, and wheat meal and

[3]The rates per 100 pounds are increased:

0.5 cents on rates not exceeding 20 cents.
1.0 cent on rates over 20 cents but not exceeding 30 cents.
1.5 cents on rates over 30 cents but not exceeding 40 cents.
2.0 cents on rates over 40 cents but not exceeding 60 cents.
3.0 cents on rates over 60 cents.

Similar increases are provided for rates expressed in amounts per ton.

flour to points in the South are 6 percent, and within the South they are 3 percent. Several special adjustments are proposed, generally by particular railroads within the West, which are to be effected by waiving the increases or exchanging them for prior increases. Because of these special adjustments, the increases in the West are said to approximate 3 percent over the X-256 level.

The special adjustments in the West are accomplished by publication in connecting link supplements to the grain and grain products tariffs. They provide, in effect, either that the 7-percent increase will not apply, that it will not apply on certain commodities, or that it will apply in place of prior general increases. The Chicago and North Western Railway Company (CNW) did not increase its rates under either Ex Parte No. 256 or Ex Parte No. 259 and, to remain competitive, other railroads serving the same part of western territory[4] also waived the increases.

To the extent that other railroads did not take the increases at particular points they necessarily sacrificed their increases at intermediate points. Fourth-section departures called to the attention of the carriers in this proceeding by the Chicago Board of Trade are being cleared. In some instances competing railroads have elected to lose traffic to those not taking the increase in preference to surrendering the increased revenue at intermediate points. Elsewhere, to maximize revenue, the competition has been met at certain points and not at others. The CNW, for example, would not apply the increases on grain from Oakes, N. Dak., whereas the Soo Line Railroad Company (Soo) would apply them from that point. Protestants, including the Nebraska State Railway Commission, Montana Commissioner of Agriculture, and the Public Utilities Commission of the State of South Dakota, contend that it is discriminatory for some railroads in a territory to take the increases while others in the same territory do not. A finding of discrimination, however, may not be based on a mere difference in rates. Rate differences between various origin areas cannot be appropriately considered or adjusted in a general increase proceeding. *Increased Freight Rates, 1967*, 332 I.C.C. 280, 300.

In most instances, the western lines propose to increase the local or gathering rates, at the Ex Parte No. 223 level, by 7 percent from, to, and between stations west and south of the area

[4] Generally north and east of the Missouri River and on and south of the line of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company from Minneapolis, Minn., through Aberdeen, S. Dak., to the Missouri River.

served by the CNW. Excepted therefrom are rates published by the southwestern lines between points in the eastern part of western territory on grain and wheat flour, which are not increased. The intermarket proportional rates in western territory would be increased 7 percent over the rates at the Ex Parte No. 223 level, except that no increase would be applied in the northeastern part of western territory, and the increase would be applied to rates not subjected to the Ex Parte No. 223 increase in the southeastern part of western territory. The western carriers do not propose to increase export rates to Gulf and Great Lakes ports, except for the gathering rates in connection with the lake export shipments and the multiple-car rates in connection with Gulf export shipments. These export rates are to be increased to the same extent as export rates to west coast ports, namely, 7 percent over the Ex Parte No. 223 level.

Under the present grain marketing practice, the price received by the farmer is the market price less the local or gathering rate to the market. This, in effect, requires the farmer to bear the transportation cost. The buyer at the first market, who pays the freight charges, uses the inbound billing to set off a part of the total charges if they are based on through rates on grain or grain products. In instances in which the gathering rates are increased, but the through rates are not increased to the same extent, such as the export rates to lake ports, the farmer pays a greater proportion of the through charge but no additional revenue is received by the railroads. Justification for the proposed increases in rates is the need for additional revenue. Application of the increases in a fashion which merely shifts the burden of the freight charges without producing additional revenue is not justified by the record herein. The order entered herein will limit our approval of proposed increases to the extent necessary to prevent application of any increase which has such result.

The protestants contend that the proposed increases will cause diversion of grain traffic to motor and water carriers. The Board of Trade of the city of Chicago calls attention to the 17-percent drop in volume of rail grain in 1967, compared with an increase of 10 percent in motor vehicle movement. This figure includes the corn movement, in which the rails suffered a 9-percent drop against a gain of 13 percent for motor vehicles. North Dakota interests point out that the production of barley has increased but that the railroads have not maintained their participation in the traffic. The United States Brewers Association,

Inc., asserts that the increases will accelerate the diversion of the brewers' traffic to private motor carriers, as well as dispersion of production facilities. Evidence of record demonstrates that, in specific situations, traffic diversion of this nature has occurred. While recognizing these possibilities, the respondents assert that appreciable diversion is not anticipated, and that they have and will continue to adjust their rates to meet specific competitive situations. Many variable and interrelated factors affect the movement of this traffic and the choice of the mode of transportation. Higher freight rates may divert some traffic, but will produce additional revenue on the remaining traffic. We cannot find that revenue losses due to possible diversion will exceed or even approach the additional revenues sought and believe that the increases should be permitted unless otherwise not shown to be lawful.

The State of North Dakota, the largest producer of barley in the United States, along with other interested parties, opposes the increase applicable to this commodity. Rates on barley produce higher revenues than those on most grains, and reduced rates have not been established from North Dakota origins as they have been on other grains and from other origins. Feed grade barley competes with other feed grains. The respondents point out that barley uses the full range of railroad services. Basic rate relationships between specific commodities may not be adjusted in this proceeding and the fact that rates yield substantial revenue does not establish that they are unlawful. No reason appears why barley should not assume the same increase as other grains.

Most of the States in the Northeast, including the New England States, New York, New Jersey, Pennsylvania, Maryland, Delaware, and Virginia oppose the increases on feed and feed ingredients. There is extensive production of poultry, dairy, and livestock products in this area; but a major portion of the feed must be obtained from other sections of the country. The area also contains major areas of high-density population wherein are located markets for the products of this industry. Rates available to similar producers in the Southeastern States are generally lower and there is active competition between these two areas in markets now reached by both.

The present annual cost of grains and feed ingredients brought into the Northeast is over $807 million. The Eastern Federation of Feed Merchants, Inc., asserts that the proposed increases on these commodities would cost the farmers in this area an

additional $2.4 million per year. Production of feed within the area has decreased in recent years. In 1966 it produced over 7.15 million tons, or 14.3 percent of the commercial feed produced in the United States. In 1967 a 6-percent decrease was experienced. Between 1958 and 1968 the number of feed manufacturers and custom mixers in the Northeastern States declined from 432 to 242.

Production of poultry and dairy farm items has been undertaken by larger organizations in recent years, including retail chains and nonfarm cooperatives. A number of egg-producing complexes have been built or are under construction which are able to take advantage of economies of volume and have resulted in the discontinuance of many family-size operations. In 1951, farmers in New York sold $52 million worth of poultry, but only $16 million in 1967. New Jersey formerly had a surplus of eggs, but now must obtain some of its requirements from other sources. In the 10 years prior to 1968, the number of farmers in Pennsylvania decreased from 116,000 to 77,000. Connecticut has had a 60-percent reduction in broiler production, although its egg production has increased some 25 percent. Maine and New Hampshire have relatively higher freight rates than in the Southeast and express fear that the proposed increases will threaten their poultry interests. Between 1964 and 1967, dairy permits issued in Virginia dropped 213, or nearly 50 percent. The dairy farmer in the Northeast also encounters the competition of dairy substitutes, such as filled or imitation milk. On their behalf it is contended that transportation costs on feeds to the Northeast must not exceed those to the Southeast.

Beginning in 1960, the eastern railroads embarked upon a study of their grain rate structure and, in July 1964, established a reduced scale (772 scale) of rates on corn. In 1967 this scale was extended to grains, feed, and feed ingredients. As pointed out in *Increased Freight Rates, 1967*, 332 I.C.C. 280, 299, this reduction was about five times the increase sought in that case. The railroads applied the full X-256 increase to the 772 scale rates, and propose to apply a 6-percent increase here. In the Southeast, however, specific increases, approximating 5 to 6.3 percent are to be applied. The actual differences in the increases for comparable movements are not substantial. Rates under the 772 scale, after application of the proposed increases, will range from 10.8 percent to 28.6 percent below rates available in 1960. Rates in the South are also affected by severe carrier competition.

The increases proposed on feed and feed ingredients also apply on cottonseed and soybean cake and meal, cottonseed oil foods, liquid or solidified, nut or vegetable oil seed cake, and similar articles. The increases on these articles, which are jointly produced with vegetable oils, are opposed by the Texas Cottonseed Crushers' Association and the Institute of Shortening and Edible Oils, Inc. Their primary objections are to the use of the STCC tariff, to which we have already referred, and to the application of a different increase on edible vegetable oil than on edible animal oil to be considered in a later section. It is asserted that the increases must be borne by the processors and cannot be passed on to the farm producers of the oil seeds. The increases appear reasonable and no reason is shown why these commodities should be exempted.

The Great Western Sugar Company produces dried beet pulp as a byproduct in manufacturing sugar. It is a feed ingredient and, after consideration of the company's protest, the respondents have agreed to include it in the feed and feed ingredient item of the tariff. In similar fashion, respondents have agreed to group plain wheat flour and self-rising wheat flour so as to take the same increase.

To the extent that rates to port cities have established relationships pursuant to orders of this Commission, as distinguished from relationships existing solely by virtue of voluntary carrier action, those relationships must be retained, and the respondents are expected to protect the lowest level on past shipments.

We conclude that the increases on grain, grain products, feed, and feed ingredients published in the master tariff are reasonable and may be applied as proposed, subject to the described limitations proposed in the connecting link supplements, except that in the West a greater percentage increase may not be made in the rates in effect on June 23, 1968, for the initial rail movement of grain from the country origin to the primary market than the lowest percentage increase made in the through rates in effect on the same date from such country origin to a destination beyond such primary market.

Sugar beets.—Increases of 5 percent in rates on sugar beets are opposed by manufacturers of sugar who contend that they have not been justified in relation to the costs of transportation of beets, and that they produce charges which yield more than out-of-pocket costs on shipments by some shippers and less than out-of-pocket costs on shipments by others. We have already

pointed out that these considerations are not appropriate in a general revenue proceeding. Further, mere rate differences alone do not establish a violation of the act. The protestants also call attention to the fact that beet sugar competes with cane sugar, many manufacturers of which are located at seaboard points and use imported raw cane sugar. Neither this factor, nor the fact that increases apply both on the sugar beets and the manufactured sugar, furnishes persuasive reason why any exemption from the increase should be ordered.

Great Western Sugar Company points out that its truck movement of beets increased from 22.4 percent of total tonnage in the 1966-67 season to 27.9 percent of total tonnage in the 1967-68 season. It asserts that approval of the proposed increases on sugar beets will result in additional diversion from rail to truck movement. Some diversion is to be expected and it may, as alleged, occur in this instance. We cannot say, however, that the increases will, in total, produce diversion of such magnitude as to nullify the expected additional revenues needed by the respondents.

Sugar.—The increase proposed on sugar is 6 percent, maximum 4 cents per hundredweight. Objections registered by certain protestants have to do with rate relationships which, as we have observed, may not be adjusted in this proceeding. The evidence fails to show that the increases will produce unlawful discriminations. As with numerous contentions of this same general nature made by many parties, the appropriate relief is by way of complaint proceedings directed to the specific problem. The Coca Cola Company opposes the increase in sugar rates, asserting that its use of freight cars is efficient and assists the respondents in effective utilization and cost reduction. If the increase is authorized, this protestant expects to readjust the movements to and from its various plants by all forms of transportation so as to incur the least possible costs. The rates on sugar in large cars, with carload minimum of 120,000 pounds, are shown to be lower now than in 1963, and lower than prescribed by the Commission in *Southeastern Sugar Investigation,* 132 I.C.C. 477 (1927).

We find the increases proposed on sugar and sugar beets to be just and reasonable.

Corn syrup and corn starch.—The Corn Refiners Association, Inc., protests the proposed 6-percent increase on its two principal products, corn syrup and corn starch. About 85 percent of

these products move by rail, mainly in long-haul transportation. The protestants object in particular to increases on corn syrup higher than increases on sugar in its various forms.

The protestants argue that corn syrup and cane and beet sugars are interchangeable for most purposes, and directly competitive in food uses, that the respondents have not justified the disparate treatment in the proposed increases as between corn syrup and sugar, and that the rate increases for corn syrup should be no higher than those authorized for sugar.

The respondents contend that there has never been a recognized rate relationship between sugar and corn syrup. Corn syrup is produced chiefly in Illinois, Iowa, and Missouri. Sugar is produced at refineries on the eastern seaboard, in Louisiana, and in the far West. These refineries all compete in the Midwest where the distances from each area are approximately equal and maximum increases or hold-downs are required to preserve rate relationships. The same competitive situation does not exist on corn syrup since it is produced chiefly in the Midwest. The record indicates that even with the 6-percent increase on corn syrups, the actual increase in cents per pound on shipments to food processors would not exceed those on sugar from its producing areas.

The record supports the increases sought by the respondents. We therefore conclude that the proposed increases have been shown to be just and reasonable.

Corn starch is in competition with potato starch and wheat starch, and also with tapioca which moves almost 100 percent by motor carrier. About 1 billion pounds of starch is used annually in the manufacture of paper and allied products such as cardboard and corrugated board; and the textile industry also consumes many millions of pounds. The protestants contend that increases should not apply to the starch rates in western territory, including transcontinental territory, because the western railroads, in large part, have excluded grain and grain products from the application of the increases, and starch should be treated likewise. They also urge that, within eastern and southern territories, maximum increases not exceeding 3 cents per 100 pounds be prescribed.

Considering the revenue needs of the respondents and the record presented here there is no sound basis for limiting the increases sought on corn starch. We conclude that the proposed increases on corn starch have been shown to be just and reasonable.

Fresh fruits and vegetables.—Several associations of fruit and vegetable growers, individual growers, the State authorities mentioned previously, as well as various food retailers and processors, oppose the 5-percent increases sought on fresh fruits and vegetables.

The long-haul shippers from origins in California, Arizona, Texas, and the Pacific Northwest request hold-downs on increases from those origins. They claim that the flat increases proposed will result in higher increases per hundredweight on long-haul traffic from western origins to the benefit of growers in other areas, mainly in Florida. They contend that the present relationships between western origins and Florida origins will be distorted by the proposed increases.

The western growers of fruits and vegetables argue further that a flat percentage increase on fresh fruits and vegetables will cause serious diversion of this traffic from the railroads to competitive modes of transportation, and also that this type of increase will further widen the difference in rates between California long-haul traffic on these commodities, and traffic from Florida to the large eastern market cities, with a resultant loss of business to western growers of fresh fruits and vegetables. They contend that the need for the increases has not been shown and if any increases are allowed, a maximum hold-down should be ordered, not only on per hundredweight rates but also on per-car rates.

The Western Growers Association points out that in 1966 on movements from California-Arizona origins of the nine largest moving vegetable and melon commodities to 41 American and 5 Canadian cities, the railroads hauled 57,411 carloads or 47 percent, while trucks handled 64,804 or 53 percent. In 1967 the figures were 52,031 or 44 percent by rail and 65,372 or 56 percent by truck, reflecting a decline by the railroads of 3 percent and 5,380 actual cars.

The Florida protestant associations of fruit and vegetable growers oppose the proposed increases on their commodities. Varying percentage increases are sought on the several types of commodities. For example a 5-percent increase is sought on fresh citrus fruits, except those moving on plan II TOFC. No increase is sought on fresh citrus fruits moving on plan II TOFC rates. Fresh vegetables except TOFC ramp to ramp take a 5-percent increase, while fresh vegetables TOFC, ramp to ramp take a 3-percent increase. Canned citrus products,

except TOFC ramp to ramp, take an increase of 6 percent while canned citrus products TOFC ramp to ramp take a 3-percent increase. Other similar claimed distortions of the rate structure occur on frozen and chilled citrus products, with some commodities at certain weights and to certain territories taking increases and some not.

The evidence indicates that the western growers, particularly from the California-Arizona area, dominate the eastern markets in many categories of fresh fruits and vegetables. Thus, the argument that hold-downs should be observed on such products from western origins in order to maintain the present rate relationships with movements of these products from Florida does not appear justified. The percentage increases will not add a very significant increase in the present differential in rates between Florida and western origins. The evidence shows that the western producers of fresh fruits and vegetables will still be able to compete with growers in other regions and with home-grown products.

While the protestants generally argue that the increases sought will cause a diversion to motor carriers, with evidence being introduced as to the downward trend in carloadings from the west in 1967, after increases authorized in Ex Parte No. 256 went into effect, the record also shows that loads, for example, of vegetables and melons from California-Arizona origins moving by truck in 1967 also declined from the 1966 total. A decline in production and heavier loadings appear to be the cause of reduced carloading rather than increased rates.

The argument by Florida growers that increases should not be allowed on boxcar citrus rates because no increases were proposed on plan II TOFC citrus rates from Florida is not tenable since plan II rates have been increased 3 percent under Ex Parte No. 256, and later increased another 12 percent effective January 31, 1968.

The Florida growers assail the proposed increases on fresh fruits and vegetables and certain canned chilled and frozen citrus products, claiming that the rate adjustments on these products are complicated and should be examined in depth. The respondents have shown the competitive circumstances calling for the differences in proposed increases. For example, the 36,000-pound rates on frozen concentrates were not increased because of truck competitive influences and the 70,000-pound rates on frozen concentrates were excluded because of water

competitive influences. The increases on fruits and vegetables are necessary if the railroads serving that territory are to receive sufficient compensation to enable them to maintain adequate service and to meet the increased costs.

In our judgment and taking into account the respondents' revenue needs, we find that the increases proposed on the commodities considered here under the heading fresh fruits and vegetables, are just and reasonable, and will not result in rates or charges in excess of a maximum reasonable level.

Canned, packaged and frozen foodstuffs.—The State authorities mentioned previously, associations of canners and freezers, retailers, and growers, oppose the 6-percent increase proposed on canned and frozen foodstuffs. They argue that with these increases the rail carriers will lose a large part of the increased traffic they have secured from these commodities since 1961 by the establishment of incentive rates, subject to minima of 100,000 pounds and higher.

The canners shipped over 16.7 million tons in 1965 and recognize that the railroads need some revenue relief, but not in the manner and extent sought here. Referring to proposed lesser increases of 5 percent on similar commodities such as fresh fruits and 4 percent on luxury articles such as cosmetics, for example, they claim that this disparate rate treatment constitutes preferential and prejudicial treatment for which no justification is shown. They contend also that the long-haul traffic is prejudiced by the proposed increases and that hold-downs should be applied on that traffic.

The respondents state that since 1947, canners have benefited from the establishment of low incentive rates, which have offset general rate increases over that period. They state that despite these lower freight rates, especially over the last 8 or 10 years, the market price of canned goods has shown a continuing upward trend. They therefore believe that the canners have benefited from reduced freight rates and rising market prices for the period, and now should bear a fair share of the increases needed by the rail carriers. The respondents further believe that in view of the comparatively slight increase proposed here, and in light of the existing incentive rates, the possibility of diversion of traffic is minute.

The proposed increases in light of the evidence, and of respondents' revenue needs, in our judgment have been shown to be just and reasonable to the extent sought.

Wine.—The Wine Institute opposes the 5-percent increase sought on wine. The principal volume of rail shipments of wine is from California to transcontinental territory. With the increase of 3 cents per 100 pounds authorized in Ex Parte No. 256, and the 5 percent sought here, protestants argue that the cost of rail movements from California to the principal eastern destinations will be increased within a year's period by 11 to 13 cents per 100 pounds. The increased transportation costs, the protestants contend, would depress further the already depressed State of the California wine industry, in competition with foreign and domestic wines, and could lead to a diversion of this traffic from rail to water which would be harmful to the railroads' own financial position.

The respondents show that the increases proposed, for example, to New York City, will only be 8 and 9 cents per 100 pounds, in packages, and in tank cars, respectively, amounting to 3/4 cent per gallon. They also point out that while the number of wineries in California may have declined, production has increased from over 78.7 million gallons in 1963 to over 83.3 million gallons in 1967, and the volume of wine transported to Atlantic coast destinations has also increased during this period.

The record shows the need for revenue increases by respondents, and the rate increases proposed have in our judgment been shown to be just and reasonable.

Trees, nursery stock, plants, seeds, et cetera.—The American Association of Nurserymen protests the 6-percent increase proposed on trees, shrubs, nursery stock, et cetera. It is asserted that the proposed increases are improper, arbitrary, and not justified; and that if any increase is allowed, it should be limited to a maximum of 4 percent. The Southern States Cooperative, Inc., opposes, among others, the increases on seed. It argues that any further increase in freight charges would subject the farming community to an even worse cost squeeze than it faces today.

The respondents contend that rates, for example, on seeds, have been reduced in the past, but that the preponderance of the traffic continues to move by unregulated motor carrier. They also contend that the increases are necessary in view of their revenue picture.

The evidence indicates in our judgment that the proposed increased rates on the concerned commodities are just and reasonable.

Walnuts.—The Diamond Walnut Growers, Inc., protests the increases proposed on its products. About 41 percent of its products are shipped in the form of in-shell walnuts and 59 percent as shelled nutmeats. Walnuts in the shell are packed in burlap bags and load up to 70,000 pounds, or in 1-pound cellophane bags packed in cartons loading approximately 60,000 pounds per car. Shelled walnuts load approximately 65,000 pounds per car. Both shelled and in-shell walnuts are frequently loaded in the same car.

It is not disputed that traditionally in-shell and shelled walnuts have taken the same rates. The respondents propose to include shelled walnuts under the heading of confectionary or related products, which take a 6-percent increase, while on edible nuts in-shell a 5-percent increase is proposed. This results from the reclassification of nutmeats under the STCC groupings as a confectionary. It may be that there is justification for reclassifying nutmeats but on this record, evidence to this effect does not appear. The carriers concede that the question of reclassification could be given further study but that a revenue proceeding is not the place to deal with it. As we hold herein, it is similarly not the place to accomplish it.

While protestant also seeks hold-downs claiming the rates proposed discriminate against long-haul shippers, it appears that the increases do not change the alleged relationship with Georgia pecan growers to any material extent.

The increases proposed in our judgment appear just and reasonable except that the shelled and unshelled walnut rates should take the same increase of 5 percent.

Cocoa beans.—General Foods Corporation protests increases on loading charges and on line-haul rates on movements of import cocoa beans through Philadelphia, Pa., to Dover, Del. The loading charge increases are discussed under the section on accessorial charges. The 6-percent increase proposed in the line-haul rate appears fully justified in light of the respondents' revenue picture and in our judgment is just and reasonable.

Livestock.—The American National Cattlemen's Association and State affiliates oppose the 6-percent increases proposed on livestock. They argue that during the period 1947-66 there has been a decrease in volume of livestock traffic so that, in 1966, rail revenue on this movement had declined to $29,200,918 or only 30.75 percent of that in 1946. They contend that since 1946 the rail livestock traffic has been substantially diverted to truck

movements, and that further diversion will result if the proposed increases herein are approved.

The respondents state that short-haul livestock traffic has been virtually completely diverted to motor carrier movements. The trend in the meatpacking industry has been to locate or relocate slaughter operations closer to the sources of livestock. This has had the effect of increasing the potential of trucking operations. The decentralization of packing plants coupled with the establishment of feed yards near slaughter plants has had an effect of reducing transportation of cattle by rail and truck for substantial distances.

Long-haul movements of livestock are not as susceptible to motor carrier diversions and the rail carriers have retained the traffic at longer distances. We are not persuaded that the proposed increases will cause further diversion of this traffic. In our judgment the record supports a finding that the proposed increases are just and reasonable.

Hides.—The Tanners' Council of America, Inc., objects to the proposed 5-percent increase on hides and skins. While generally objecting to any rate increase on hides, the protestant also points out that the ratio of payments for rail freight to hide and skin commodity values is relatively high, as compared with the past. This is caused, however, not by the increases in rail freight rates, but by the tremendous increase in cattle slaughtered during the recent past. In our judgment the record supports a finding that the proposed increased rates are just and reasonable.

Fresh meats and packinghouse products.—The proposed increases on fresh meats and packinghouse products are 5 percent, except when rates are published in cents per 100 pounds of 80 cents or less, in which case the increase is 2 cents per 100 pounds. Several meatpackers and the Department of Agriculture oppose the increase. The protestants, among other points, state that no credible evidence was introduced by respondents to show the basis for the proposed increases. They believe also that a large part of the present traffic in these commodities would be diverted to motor common carrier and private carrier; that rail traffic has substantially declined in recent years and will continue to do so if the proposed increases become effective; that the proposed increases would cause a decline in meat consumption and that the 2-cent hold-down for rates of 80 cents or less results in undue preference and prejudice.

The respondents point out that the principal rail movement of fresh meats is from western trunkline territory to eastern

territory; that the preponderance of this movement is long-haul traffic; that the rates on these commodities have had numerous reductions in recent years; and that various incentive rates reflecting higher minimum weights have been established. They contend that if the proposed increases are permitted to become effective the resulting rates will still be well below maximum reasonable levels. The 2-cent limitation on rates of 80 cents or less is designed to preserve respondents' competitive relationship with motor carriers on short-haul traffic. The rail carriers do not believe the increases proposed would cause diversion of their existing traffic, but in any event would consider future adjustments and reductions where required.

The evidence indicates a need for the increased revenue to be secured from the proposed increases. Based on the average rate from western trunkline to eastern territory, the increase would be only 8 cents per 100 pounds on these products. Under all the circumstances shown, in our judgment the proposed increases on fresh meats and packinghouse products have been shown to be just and reasonable.

Cheese.—The Kraft Foods Division of National Dairy Products Corporation opposes the increase of 6 percent on cheese. It contends that since 1960, due to the relative rate stability, rail tonnage and revenue from cheese traffic have gained substantially. Carload minimum weights were increased in this period, which resulted in increased per-car revenue. From 1963 to 1967 Kraft has increased its tonnage shipped by rail more than 60 percent and there has been a steady gain in the proportion of Kraft Foods cheese tonnage shipped by rail, with resultant reduction in tonnage handled by private motor transport. Protestant argues that the proposed increases will cause diversion to private motor carriers.

While some diversion may result, with the incentive rates in effect, such diversion would not appear to be significant. The evidence indicates the proposed rate increases to be just and reasonable.

Vegetable oils, lard, edible tallow, et cetera.—The Institute of Shortening and Edible Oils, Inc., and Anderson, Clayton Co., protest the proposed increases on vegetable oils, shortenings, lard, and other animal fat products. On vegetable oils and commodities grouped therewith in item 685 of the master tariff, the proposed increase is 1 cent on rates not exceeding 20 cents per 100 pounds, 2 cents on rates exceeding 20 cents but not

exceeding 40 cents per 100 pounds, and 6 percent on rates exceeding 40 cents per 100 pounds. On lard and certain meat products grouped therewith in item 595 of the master tariff, the proposed increase is 2 cents on rates 80 cents or less per 100 pounds and 5 percent on rates over 80 cents per 100 pounds. The institute states that its members paid the railroads $67.1 million in freight charges in 1967, including about $4 million for transit and accessorial charges, and that the proposed increases will cost them another $3,850,000, including about $250,000 in increased transit and accessorial charges, which, they say, would unduly burden their industry. The protestants also argue that no studies were made prior to the setting of the separate rate increases on these commodities, that the respondents have not submitted the quantum of proof necessary to meet their burden, and that, even if a revenue need is found by the Commission, the increase for vegetable oils and related commodities in item 685 should not exceed the increase proposed for lard and related commodities in item 595.

The respondents contend that there has been an increase in the per capita consumption of these commodities and that the proposed increases would only be a small amount per pound. They point out that lower incentive rates have been published to help the vegetable oil shippers and to meet carrier competition. They further show that, while lard is grouped with certain packinghouse products for the purpose of the proposed increase, ordinarily lard does not move on packinghouse products rates but rather on a lower specific basis at the identical level with vegetable oil shortenings. Such lower rates are the result of motor carrier competition.

Respondents have shown the need for revenue increases and these commodities must bear their fair share of such increases. However, in view of the competition between lard and vegetable oils, which is recognized in the underlying rate levels, we will not approve a higher rate increase for item 685 than for item 595. With the exception noted, the proposed increases have been shown to be just and reasonable.

Wool.—On animal fibers, including wool, the proposed increase is 6 percent. The National Wool Growers Association opposes the increase, citing the possibility of diversion to truck movement, the heavier loading of wool in contrast with past practices, and the competition from synthetic fibers. It is contended that the increase is unreasonable when compared with the 3-percent

increase on synthetic fibers. The respondents point out that rates on wool are lower than those found maximum reasonable in *Wool and Mohair Rates*, 276 I.C.C. 259 (1949), increased to the Ex Parte No. 256 level, and that incentive rates are available from the major producing areas in the Southwest. Rates on synthetic fibers are at a higher level than those on wool, and the difference in the increases will reduce only slightly the advantage now held by wool. Thus, for a movement of 2,000 miles, at a minimum weight of 40,000 pounds, the wool rate would increase from 156 cents per hundredweight to 165 cents; while the synthetic fiber rate would increase from 192 cents per hundredweight to 198 cents. No reason appears why animal fibers should not bear the increase as proposed.

Cotton.—Rates on raw cotton are proposed to be increased by percentages which vary according to the tariff minimum to which the particular rates apply. Rates subject to a tariff minimum weight of 35,000 pounds or less are to be increased 6 percent; those subject to a minimum over 35,000 pounds to and including 50,000 pounds are to be increased 5 percent; and those subject to minimum over 50,000 pounds are to be increased 4 percent. Protestants assert that diversion of traffic to trucks will result from the increases but the respondents point out that rail movement of cotton has been reasonably stable for several years, and that movement by exempt truckers has certain advantages in particular areas which railroads cannot meet. Elsewhere, the rail service, which includes transit privileges is more desirable and is expected to hold the usual share of the traffic.

In 1967, about 95 percent of the cotton consumption was in Southeastern States, but some 85 percent of the production was in States in the Mississippi Delta area, the Southwest and on the Pacific coast. Rates on cotton to the Southeast have been held at a low level as the result of a series of reductions. In 1955 the rates from the Mississippi Valley area were reduced about 15 percent and since then, except for Ex Parte No. 223, no subsequent general increases have been applied. Generally these rates are lower today than those in effect in 1949 after the application of the Ex Parte No. 168 increase. Rates from the Southwest were reduced in 1956 by removal of the Ex Parte No. 175 increase plus 2 cents. The transcontinental 50,000-pound rate was reduced by 17 cents in 1956; and, in 1966, reduced rates at higher minima were established from the west coast.

The protestants also contend that the increase of 4 to 6 percent on cotton is unjust when compared with the increase of 3 percent

applied to synthetic fibers. Synthetic fibers increased their share of the total fiber market from 21.7 percent in 1950 to 45.6 percent in 1967, during which period cotton's share declined from 68.3 percent to 49.2 percent. The respondents point out, however, that the annual consumption of cotton fibers has remained relatively stable, and that the increased use of synthetics is the result of consumer desires for blended fabrics, rather than relative transportation costs. The 5-percent increase results in increases of 4/100ths cent per pound to 6/100ths cent per pound on movements from Memphis, Tenn., and Lubbock, Tex., to Greenville, S. C. As noted in our discussion of rates on wool, rates on synthetic fibers are generally higher and the impact of the difference in increases will be to reduce somewhat the advantage of the cotton rates. The respondents point out that cotton moves for much longer distances than synthetics generally and on rates based on large groupings of origins and destinations rather than on mileage rates, which apply to synthetics. The difference in increase between these commodities cannot be found to violate the Interstate Commerce Act, and no reason appears why the proposed increases on cotton should be denied.

Hay and straw.—The National Hay Association, the New York State Hay and Grain Dealers Association, the United States Department of Agriculture, the New York State Department of Agriculture, Southern States Cooperative, Inc., and N. E. Lohr of Madison County, Va., protest the proposed 8-percent increase on hay and straw. They contend that the movement of hay is an essential segment of commerce, particularly during periods of drought, that the rate level on hay with the proposed increases is completely disproportionate to its value and is high compared with other commodities, that the rail rates on hay are fully compensatory without the increases, and that the railroads have an obligation to furnish equipment for the movement of hay which they should not be permitted to evade by setting prohibitively high rates.

The rail respondents claim that little total hay production of the United States moves in interstate rail service, since most of it is either consumed on the farm or moved in short-haul unregulated motor carriage. Out of a total annual hay production of over 120 million tons, the railroads generally transport less than 200,000 tons. And since only about 15 percent of the total hay production tons enters commerce, the respondents argue that they are a minor factor in the handling of hay.

The cost presentations of the parties do not clearly indicate the level of compensativeness of the rates on hay; but the evidence does indicate that, although hay and straw are low-grade commodities, they can bear a greater share of the revenue needs of the respondents than they are at present. While the 8-percent increase is higher than most of the proposed increases on agricultural commodities, it is not an unreasonable increase. Moreover, in periods of drought, we customarily authorize the establishment of substantially reduced rates pursuant to section 22(1) of the act. On all the evidence of record and in light of the respondents' revenue needs, we find the proposed rate increases on hay and straw to be just and reasonable.

Lumber and forest products.—On lumber and other forest products, the respondents propose an increase of 5 percent. Western producers urge that, if the increase is allowed, it be subject to a maximum of 2 1/2 cents per hundredweight. Of particular concern to these producers is the competition of lumber from southern origins in the eastern and middlewestern markets. To meet delivered prices, producers with higher transportation charges must absorb some portion thereof. Application of the percentage increase to the higher rates for the longer hauls from western origins tends to increase the spread between total freight charges and enlarge the amounts which western producers must absorb. It is contended that the increases under Ex Parte No. 259 will result in appreciable reductions in eastbound movements of lumber and lumber products.

The respondents estimate that the proposed increase will produce some $31.8 million annually in increased revenues, and that the sought holddown of 2 1/2 cents per hundredweight will reduce this to $15.2 million. Lumber, plywood, and forest products, in 1966, constituted 7.57 percent of the total revenues of class I railroads. The respondents point out that since 1946 rates on these commodities have been increased substantially less than on other commodities, that reduced incentive rates were published in 1961, and that, although no increase in rates occurred between 1960 and 1967, the wholesale price index of wood products rose 5 percent. It is estimated that the increase here proposed will result in an average increase of a little over 1 percent in delivered prices.

Lumber producers in the South enjoy lower rates due to their proximity to the eastern and middlewestern markets, and because of the availability of truck and water competition. Nonetheless,

although the spread in rates between the South and West has increased, the western producers continue to dominate the market. Between 1946 and 1967, softwood lumber production in the West rose from 14.4 billion to 20.9 billion board feet, while production in the South dropped from 9.4 billion to about 6.7 billion board feet. There has been a substantial increase in plywood production in the West in recent years. Generally, throughout the East and central States, western production has accounted for one-half to two-thirds of the consumption of softwoods. We find that the differences resulting from the percentage increase on lumber and forest products as between these two producing areas are not unreasonable and that, in view of the importance of this traffic and the respondents' need for additional revenue, a holddown on the increase would not be proper. The increases are just and reasonable and are not discriminatory or unduly prejudicial.

Woodpulp.—Importers of woodpulp oppose the 5-percent increase proposed on this commodity, asserting that railroads, at least in the East, do not provide heavy-loading incentive rates on import woodpulp, and referring to the reduction in tonnage imported from Scandinavia between 1959 and 1967. The respondents point out that loading of cars is done by the carriers or their agents, and that, due to a surplus of cars in the East, it is frequently more efficient to load two or more cars, rather than to load one more heavily. Woodpulp production in the United States has increased greatly in recent years, and it cannot be found that any decrease in import tonnage from particular foreign sources is related to railroad freight rates. We find the sought increase to be just and reasonable.

Pulpwood, paper, and paper products.—Proposed increases on pulpwood and wood chips, paper, and paper products, are similarly 5 percent. Protestants assert that heavier carloadings, increased volume, and reduced detention have so contributed to the carriers' revenues that the proposed increase should be denied. Cost evidence was offered which purported to show that the present rates exceeded full costs of the service. They were, however, based upon a number of studies whose reliability was severely challenged. As we have heretofore observed, such a showing is of little probative value in a case of this type. The respondents point out that, notwithstanding the alleged competition from the plastics industry, paper manufacturers have increased gross sales by 100 percent since 1955 and enjoy a return of 9.8 percent. In the South, rates authorized in prior ex parte pro-

ceedings have not been taken in full in all cases, and reduced incentive rates have been published.

The protestants contend that paper and paper products are easily diverted to movement by truck, and that the proposed increase will have this result. The respondents show, however, that from 1957 to 1967, during which three general increases were published, rail participation in the movement of coarse paper, newsprint paper, and paperboard, fiberboard, and pulpboard increased appreciably. No reason is shown why these commodities should be exempted from the proposed increases.

Scrap and waste materials.—Rates on scrap and waste materials, which include such materials as waste paper and rags, textile wastes, scrap rubber, and scrap plastics, are proposed to be increased 5 percent. The National Association of Secondary Materials, Inc., representing over 600 members of the secondary materials industry and certain individual members of the association, oppose any increase in the rates on scrap and waste materials. The protestants assert that the industry generally does not have the power to control its prices, which are competitive with prices of virgin materials and other secondary materials. They assert that the industry is faced with the problem of mounting operating costs, particularly high labor costs, and increasing financial investments for materials handling equipment and machinery to keep its plants in operation. At the same time it is a low net profit industry, many members of which operate at a net profit level of 2 percent or less. They generally forecast poor marketing conditions for the future. Protestants maintain that the industry does not have the ability or the flexibility to pass additional costs on to its consumers. Many smaller companies they assert, have had to cease operations because of ever mounting costs. It is claimed that many shippers have invested in highway equipment which will tend to make diversion of traffic more permanent, that the railroads lost 15 percent of this business following the Ex Parte No. 256 increases, and that they will lose another 20 percent if the proposed increases are made. Protestants stress the favorable transportation characteristics of their traffic; heavy loading and heavy volume; regularity of movement; 2-way use of cars; ability to use standard (nonspecialized) equipment; no need for special services; and negligible loss and damage claims. They presented a comparison of rates on waste paper and rags at the Ex Parte No. 256 level with out-of-pocket and fully distributed costs, which indicates

generally that the present rates are compensatory. Protestants also contend that the proposed increases on their commodities are discriminatory because they are higher than the 3-percent increase proposed on allegedly competitive commodities, such as cotton linters pulp.

The respondents point out that the proposed 5-percent increase will apply uniformly in all territories and will preserve rather than reduce the marketing areas of these materials. Regarding the threat of diversion of this traffic to motor carriers, they observe that motor carrier operations are also experiencing increased costs, as is evident by rate increases recently granted to the motor carriers. Respondents also point out that rail tonnage of scrap paper and rags increased from 3.2 million tons in 1957 to 4.7 million tons in 1966, which refutes the protestants claim that past increases in rates have caused a diversion of rail tonnage. A study made by respondents on textile waste, scrap and wastepaper, and rubber and plastic scrap indicates that their traffic has remained steady or increased slightly in the years 1964, 1965, and 1966. Comparable statistics are not available for 1967 because of discontinuance of our waybill studies.

The Index of Average Freight Rates on Railroad Carload Traffic, Statement RI-1, published by the Commission's Bureau of Economics, shows that the average freight rate on scrap paper and rags (based on 1950 index as 100) declined from 132 in 1957 to 108 in 1963. With the proposed increases in rates in southern territory, cotton waste materials will move on lower rates than those in effect prior to December 10, 1959, except that rates will be 2 cents per 100 pounds higher at 900 miles. Rates on rags, minimum 40,000 pounds, between points in southern territory, including the proposed increases will be lower than those in effect prior to August 10, 1959. Respondents urge that it has been their policy to make rate adjustments wherever possible to prevent a loss of traffic to the railroads and that they will continue to do so. As an example, reduced rates on synthetic fiber waste within southern territory, minimum weights 60,000 and 100,000 pounds, were published and became effective August 10, 1968. The respondents realize that these materials require no special equipment and cannot stand excessive rates. They contend, however, that railroad costs of operations are not confined to particular equipment, that even ordinary equipment, which is much in demand, represents a very substantial invest-

ment by the railroads, and that such equipment is not insulated from increases in cost.

In a proceeding of this nature, to the extent practicable, all rates and charges should bear a portion of the increased revenue needs of the railroads. Based on this record, we are not persuaded that the proposed increases in rates on scrap and waste materials will result in rates that exceed the maximum level of reasonableness or will create an undue burden on this traffic. Differences in increases on other commodities, alleged to be competitive, do not, without more, make the increases unlawful. We find the proposed increases on scrap and waste materials to be just and reasonable.

Fertilizer.—Proposed increases in rates on fertilizers are 3 percent, maximum 1 cent per 100 pounds, 20 cents per net ton, and 22 cents per gross ton. On superphosphate, the increase is 3 percent, maximum 5 cents per ton, net or gross, as rated. Increases on certain chemicals used in soil compounds are 5 percent, minimum 2 cents per 100 pounds. Rates on potash are to be increased 5 percent, subject to a limit of 53 cents per net ton from western territory to Florida and certain ports on the Gulf of Mexico.

Certain protestants have called attention to the fact that sundry components of fertilizers which have historically taken increases similar to fertilizers generally, have not been so treated in the X-259 master tariff. In reply, the railroads have expressed a willingness to revise the tariff as shown below so as to equalize these increases.

STCC No.	Commodity	Present Tariff Item	New Tariff Item
20-619-25	Beet or cane residuum potassium (potash).	520	605
20-713-17	Cocoa bean shells	580	605
20-939-60	Castor pomace	520	605
20-939-21	Tung nut meal	520	605
28-123-35	Sodium (soda) nitrate (chile saltpeter).	730	605
28-126-35	Calcium cyanamid	730	605
28-126-39	Calcium nitrate (lime nitrate).	730	605
28-191-10	Ammoniacal liquor or aqua ammonia, nec.	730	605
28-191-46	Ammonium phosphate, nec also applies on diammonium phosphate.	730	605
28-191-49	Ammonium phosphate, monobasic, crude.	730	605
28-191-55	Ammonium sulphate	730	605
28-191-58	Ammonium sulphate nitrate (leunasalpeter).	730	605

STCC No.	Commodity	Present Tariff Item	New Tariff Item
28-195-30	Ferrous sulphate	730	605
28-195-52	Ferrous ammonium sulphate, fert. grade.	730	605
28-199-24	Sodium and potassium nitrate	730	605
28-799-71	Soil compounds consisting of more than one of the following: chlorides, limes, magnesia, manganese, phosphates, carbonates, iron oxide, potash, silicates, sulphates.	730	605
40-291-27	Sludge, sewage, dry, fertilizer material.	900	605

(Nec-not elsewhere classified).

The respondents will be expected to make these revisions promptly.

The National Plant Food Institute and various producers of potash oppose the different treatment given this commodity. Potash is one of the three basic materials used in the manufacture of fertilizer. In the United States it is produced in New Mexico, Utah, and California, with New Mexico accounting for over 90 percent of the production. It is a low value and heavy loading commodity which, due to the location of the mines, moves almost exclusively by rail and in long-haul movements. About 23 percent of the domestic production is used directly as a fertilizer and about 72 percent is used in combination with other chemicals to manufacture mixed fertilizers. In Ex Parte No. 256 we concluded that the general information submitted with respect to potash did not establish that it should be excluded from the general increase in freight rates. On the other hand, our findings in that case also make it clear that no distinction was to be made between potash and other fertilizer materials in applying the increase. No justification has been given in this proceeding for the substantially higher rate increases sought to be assessed on potash than on other comparable fertilizers or fertilizer ingredients. No reason is given why potash should not be accorded the same consideration as has been given to other fertilizer ingredients which the respondents have agreed to include in master tariff item 605. We find that the application of a higher percentage increase on potash than on other fertilizers and fertilizer ingredients is unjust and unreasonable and that the increase on this commodity should not exceed 3 percent.

With the tariff revisions mentioned above, the fertilizer group increases are at the lowest level of all proposed increases. Rates on fertilizers are below prescribed levels, and revenues per ton-

mile are the lowest since prior to 1950 on a nationwide basis. It is contended that all fertilizers should be held to the same increase as superphosphate. The limitation of 5 cents per ton on this item, however, reflects the extensive water competition from Florida origins which does not exist with respect to fertilizers generally. The record fails to show that this traffic should not bear some part of the additional revenue requirements of the respondents; and, except as above noted, the proposed increases are approved.

Phosphate Rock.—The increase of 5 percent, maximum 15 cents per net ton or 17 cents per gross ton, is objected to on the grounds that it will have an adverse effect on the fertilizer industry and will impose an additional cost on the farmer which could inflict immediate harm on the American Farm economy. It is claimed that phosphate rock is being asked to bear a disproportionate share of the general increase. The price of phosphate rock has been increased 30 to 50 percent during the period from 1956 to 1968. Yet, the present rates thereon are in many instances less than those in effect on June 1, 1956. In the circumstances we are convinced that the increase proposed is just and reasonable.

Construction aggregates, sand, lime and limestone.—The proposed increase on sand, gravel, crushed stone, cinders, slag, shale, limestone (except furnace limestone), and similar commodities is 6 percent, minimum 10 cents per net ton and 11 cents per gross ton, except in and to the South. To and within the South the increase, on rates not exceeding 100 cents per ton, net or gross as rated, is 15 cents per net ton or 16 1/2 cents per gross ton; on rates over 100 cents and not over 200 cents per ton, the increase is 20 cents per net ton or 22 cents per gross ton; and, on rates over 200 cents per ton, the increase is 25 cents per net ton or 27 1/2 cents per gross ton. Like increases are proposed on brick or tile raw materials and crude shale. Rates on fluxing stone and furnace limestone are proposed to be increased 6 percent, maximum 15 cents per ton, net or gross, as rated. A flat 5-percent increase is proposed for shells, (oyster, crab, clam, et cetera). Rates on native asphalt or bitumens (asphaltic limestone) are proposed to be increased 6 percent.

The National Crushed Stone Association and numerous producers and users of these commodities object to the proposed increases and call attention to the greatly reduced participation of the railroads in the movement of this traffic, which they attribute to rates which have encouraged truck and water competition.

Demand for low-value construction aggregates is said to be highly elastic wherever the delivered rail price exceeds the delivered truck price from local origins. Rail shippers of these commodities contend that the proposed increases will have the inevitable result of contracting their marketing radius, with consequent loss of sales and diversion of more tonnage from rail to truck movement. A net loss rather than increase in railroad revenue is predicted. It is pointed out that the minimum increase of 10 cents per net ton results in percentage increases of as much as 20 percent in the lower rate brackets, and that the freight charges frequently exceed the f.o.b. price of the aggregate. U.S. Bureau of Mines statistics for crushed stone, other than stone used in the manufacture of cement and lime, indicate that between 1947 and 1967, production more than tripled while the percent of production moved by rail decreased from 36 percent to 13.3 percent. The protestants attribute this diversion to the increases in freight rates, and assert that the proposal in issue will have the same consequences.

One producer of crushed stone which sells its products in interstate commerce asks that we not permit the increase on interstate traffic until appropriate State regulatory bodies authorize the same increase on the intrastate movements employed by competing producers. In light of the clear showing here of revenue need we do not consider the imposition of such qualifications to be warranted in any orders to be issued in this case.

Construction aggregates have favorable loading characteristics but, as pointed out by the respondents, move, on the average, over short distances. Prior general increases in many instances, have not been taken on these items, or have been taken only partially. These factors combine to produce percentage increases which appear out of proportion when the minimum amounts are applied. It cannot be found, however, that the resulting rates are in excess of maximum reasonable rates. Whether the freight rates are the sole, or the primary cause of the reduction in rail movement is not certain. It appears undisputed that very small differences in delivered costs govern the source from which users procure these commodities; but the available statistics show substantial losses in rail movement during periods in which rail rates were not increased, and, in fact, during which competitive reductions were made. The respondents contend that the change in movement of the traffic arises out of the extensive development of sources of supply not located near rail

tracks, the expansion of highway building, dam construction, et cetera at points where rail delivery is not possible, and the development and use of portable plants at sources near points of use. It is also contended that truck rates have likewise risen and that the diversionary effect of the increases here proposed will be minimal.

Increases on lime, limestone, and limestone products are opposed by the National Limestone Institute, Inc., National Limestone Association, Glass Container Manufacturers Institute, Inc., American Glassware Association, various producers, steel manufacturers, sugar refiners, and others. Limestone is used as an aggregate in road building and construction materials, a fluxing material in the iron and steel industries, in the manufacture of fertilizers, the production of sundry chemicals, refining of sugar, et cetera. Contentions of protestants with respect to limestone are similar to those made with respect to aggregates generally. Oyster shells compete with limestone both as a construction aggregate and as a component of poultry feed. Shell producers contend that the combined effect of the increases in Ex Parte No. 256 and those proposed in this case is to disrupt competitive relationships and to discriminate against shells. The increases under consideration, however, are lower in certain instances on shells than on limestone.

On lime and lime plaster the proposed increases are 20 cents per net ton on rates not exceeding $6, and 4 percent on rates over $6 per net ton. It is contended that this prejudices producers of lime since the rates on the raw material, furnace limestone, are to be increased a maximum of 15 cents per net ton, thus encouraging users of lime to manufacture their own. The actual impact of this difference in rates is not apparent, however, since the 15-cent maximum applicable to furnace limestone is accompanied by a 6-percent increase in rates. As with industrial sand used in foundries, it is contended that lime used in water purification plants and paper manufacturing plants is now being reclaimed for further use, thus displacing possible shipments of new material. While cost factors would appear to be significant in a decision to embark upon a program of reclaiming such materials, it does not appear that rail transportation charges have been a controlling factor. The development and use of alternative processes for manufacture of various commodities, such as the use of hydrocarbon processes in the production of acetylene, instead of lime, and the use of masonry cement in

place of masonry lime, appear to have little direct relation to the transportation costs of lime. In large part, the objections to increases on lime are directed to the failure to make similar increases on allegedly competitive products, particularly limestone. The extent to which these items are directly interchangeable in any particular use does not appear, however, and it cannot be said that the proposed increases actually produce any undue prejudice.

Steel producers oppose the increase on fluxing limestone, contending that this commodity, along with other steel industry raw materials, already contributes substantially and adequately to rail revenues. Lime producers also cite the prospect of construction of lime plants by steel producers to serve their own needs, thus eliminating movements from independent producers. As we observed in Ex Parte No. 256, lime can be used interchangeably with fluxing limestone in the manufacture of steel but the former is several times more valuable than the latter, which offsets the fact that smaller quantities need to be used. The respondents point out that the rates on lime and limestone are at a low level and have been the subject of numerous competitive reductions over the past years. The average rate per ton, U.S. to U. S., was $4.90 in 1965 compared to $6.20 in 1959. While the average load has increased, the average distance of haul and the average revenue per car have remained about the same. The respondents point out that lime plants built or acquired by steel producers have in some instances been at substantial distances from the steel mills and still use rail movement. It is also shown that many lime plants located near steel mills have been those of independent producers.

The increases proposed on these commodities appear reasonable and no reason appears why they should be exempted from the general increase.

Industrial sand.—On industrial sand the proposed increase is 5 percent, minimum 10 cents per net ton or 11 cents per gross ton. Protestant producers of industrial sand and glass manufacturers assert that the increase is unjust and that diversion of the traffic to truck movement will result in net revenue losses to the railroads. The respondents point out that this commodity is of relatively high value, moves in closed cars or covered hopper cars having 100 percent empty return, and over long distances from a limited number of origins. The average rate per net ton declined between 1959 and 1965 from $3.72 to

$3.34, while between 1960 and 1966 the rail tonnage increased from about 18 million net tons to over 24 million net tons. We find the proposed increases on industrial sand just and reasonable.

Cement.—Rates on cement are proposed to be increased 2 cents per 100 pounds when in packages and 1 cent per 100 pounds in bulk, except that within and to the South the proposed increase on both bulk and package cement is 2 1/2 cents per 100 pounds. In their brief, the respondents commit themselves to apply the proposed 2 1/2 cent increase in the South on both package and bulk cement to the level of rates in effect prior to Ex Parte No. 256. The increases are opposed by the National Association of Cement Shippers and several cement manufacturers.

It is contended by protestants that the flat increases produce abnormal percentage increases when applied to the shorter movements, that the increases will divert substantial traffic to truck movement and that the difference in treatment between package and bulk cement is unreasonable. It is also argued that market relationships of package cement will be disrupted since the increase of 2 1/2 cents on shipments to the South must be added to the rates as already increased in Ex Parte No. 256, whereas package cement rates within the South were not increased in Ex Parte No. 256. The protestants assert that package cement moves in the oldest boxcar equipment, carrying the lowest per diem rates, in comparison to the more expensive hopper cars used for bulk movements.

In recent years cement manufacturers have made a substantial change in their methods of distribution. Instead of employing direct rail delivery to customers, volume movements of cement are now made to distribution terminals from which deliveries to customers are made by truck. Thus, Lehigh Portland Cement Company, which formerly moved some 95 percent of its production directly to customers by rail now delivers only 18 percent in this manner, but utilizes rail for the movement of about 42 percent of production to the distribution terminals. The protestants argue that higher rail rates may make it more economical to employ direct truck movements from plant to customer, with consequent loss of rail traffic to the distribution terminals.

It is also contended that the higher increase on package cement will disrupt existing relationships between the two methods of shipment. The respondents assert that package cement loads, on the average, to much lower weights than bulk cement and moves generally in different distribution channels. Rates in the South

and West are now higher on package cement than on bulk cement. Generally, rates on cement are lower, even with the inclusion of the proposed increase, than prevailed in the early 1950's due to a number of reductions made between 1955 and 1965. The respondents contend that truck costs and rates have increased and that for the distances over which cement generally moves by rail, the rail rates will still be lower. While the flat increases produce percentage effects as high as 45 percent on movements under 30 miles, very little cement moves by rail for these distances. In 1965 only 3 percent of the interstate rail movement of cement was less than 50 miles and the average distances in the various territories were close to 200 miles. Minimum charges for carload service already exceed the charges based upon average loadings for distances under 50 miles and the proposed increases have little significance for such movements. It is pointed out that, although some older cement mills have been closed, they have been supplanted by new, modern facilities. Between 1956 and 1966, domestic shipments of cement increased from 308 million to 380 million barrels.

In Ex Parte No. 256 we approved increases which ranged up to 3 cents per hundredweight and 60 cents per net ton. On rates over 10 cents and not over 30 cents per 100 pounds the authorized increase was 1 cent. This increase applied in most instances to the movements over 100 miles which consituted the preponderance of the traffic. In 1965, over 82 percent of interstate movements exceeded 100 miles. The increase now proposed on bulk cement, except in and to the South, is also 1 cent per 100 pounds. In the South, the application of the 2 1/2 cent increase to the pre-X-256 rates on both package and bulk cement maintains the same relationships. The increase in other territories of 2 cents per 100 pounds on package cement, while higher than that applied to bulk cement, does not result in unjust and unreasonable rates, and appears warranted by the differences in transportation characteristics. We find the increases proposed on cement, as set forth in the master increase tariff and modified by the commitment in the respondents' brief, are just and reasonable.

Fly ash.—Fly ash, a waste product produced by plants which burn coal, is used as an ingredient in making concrete. It competes with various other products for this purpose and less than 10 percent of that produced is so used, the rest being disposed of as a waste. The proposed increase in rates on fly ash is 6 percent, subject to minima and specific increases to and within the South as

set forth above for aggregates generally. The protestants compare this increase with the increase of 5 percent, maximum 15 cents per ton, which is proposed for the coal from which the fly ash is produced. They also point out that rates on coke breeze, a commodity physically resembling fly ash, is to receive the coal increase only. Fly ash is a low-value commodity with an average f.o.b. price on rail shipments of $1.50 per ton. On movements to the principal rail markets in the West and Southwest, the rail rates range from $7 to $13 per ton. We have heretofore found that transportation cost is usually the controlling factor in the disposal of fly ash. *Fly Ash, Chicago and Trenton, Mich., to Official Points*, 292 I.C.C. 349, 360; *Increased Freight Rates, 1967*, 332 I.C.C. 280, 328. The protestant urges that, if any increase is allowed on fly ash, it be restricted, in similar fashion as the coal increase, to a maximum of 15 cents per ton.

The respondents point out that fly ash competes with other aggregates and is to receive the same increase as these products. Rates on this commodity are at a very low level, 9 1/2 percent of first class, similar to cinders and industrial sand. In Ex Parte No. 256 we authorized a 5-percent increase on fly ash without limiting maxima. No reason is shown why this commodity should be exempted from the general increase, nor has it been shown that it should receive a holddown not applicable to other commodities with which it competes. Its value per ton, however, is less than one-third the value of the coal of which it is a waste product and in many instances, the proposed increase amounts to about 50 percent of the f.o.b. sales price. We find that the increase on fly ash should not exceed 3 percent over the basic rates.

Compressed or liquified gas.—Rates on butane, propane, and liquified petroleum gas are proposed to be increased 4 percent. Rates on liquified gases other than butane, propane, and liquified petroleum gas are to be increased 6 percent. Rates on compressed or liquified industrial gases (except vinyl chloride), elemental gases, carbon dioxide, and acetylene are to be increased 8 percent. In the last group are included argon, helium, hydrogen, neon, oxygen, and fluoroethane gases, and various mixtures.

In recent years the use of oxygen has greatly increased, particularly in the steel industry. In 1956, 2.5 million tons were used, of which the steel industry used 1.1 million tons. In 1966, the total had increased to 11.7 million tons, of which steel plants used 7.1 million tons. The air-reduction method of producing this gas

makes it possible to locate plants without concern as to incoming raw materials, assuming the availability of a sufficient power supply. Thus, such plants frequently have been located close to substantial users, such as steel plants. In the air-reduction process other gases, including nitrogen, argon, neon, and helium are produced at the same time.

Helium is also produced by the Bureau of Mines by extraction from natural gas and its primary user at present is the United States Government. It moves in tank cars as a gas, loading somewhat under 3,000 pounds per car, and moving under rates which provide for a minimum carload weight of 40,000 pounds. So handled, it can and does move substantial distances. This gas can also be liquified but since there is a practical limit of not over 48 hours in which it can be held in this state, movements as a liquid are confined to motor vehicle tank trucks and to distances limited by the time in transit. Possibilities of greatly increased commercial use of helium are indicated. Production and use of nitrogen and argon have also increased substantially in recent years.

It is contended that fluorocarbons compete with hydrocarbons such as butane and propane for use as dispersants and propellants; that prices of the former range from 19 cents to 57 cents per pound, whereas prices of the latter range from 5 to 8 cents per pound; and that an increase of 8 percent on the former while the latter are increased only 4 percent is unreasonable. The protestants fear increased use of the hydrocarbons in place of fluorocarbons if the rates on the latter, which are presently higher than those on hydrocarbons, are increased by the higher percentage. It appears, however, that the extent to which hydrocarbons are used in this competitive area is limited by certain inherent qualities, including odor, flammability, toxicity, lack of solubility, and thermal and chemical stability. It cannot be found that the alternative manufacturing possibilities of the hydrocarbons will be enhanced as a result of the proposed rate increases or that fluorocarbons will be prejudiced thereby.

Generally, opponents of the rate increases cite the likelihood of diversion of the traffic to motor vehicle transportation. It is asserted that the increase may result in the conversion of the helium output of the Bureau of Mines to liquified gas and movement in tank trucks. Protestants also contend that the increases will engender development of new plants with local service provided by motor vehicle. At the same time, they assert that a continuing need for long-haul movement of liquid oxygen, nitrogen, and argon is to be

expected with a volume greater than in the past. The respondents point out that the overall rail movement of industrial gases has not decreased in recent years but that, notwithstanding various rate reductions at higher minima, the average loading per car has not increased. They attribute the failure of the railroads to increase their volume in relation to the increased output and use of compressed gases to the convenience and economics of decentralization, not to the rates for rail transportation. The protestants contend that many shippers supply their own cars for movement of these commodities and that claim ratios are favorable. The record fails to show any reason why compressed gases should not bear a proportion of the increased revenues of the railroads, nor can it be found that the rates as increased will be unlawful. While the increase of 8 percent is challenged as excessive in relation to the increases on other commodities, no substantial relationship was shown to exist, and no basis for a finding of undue discrimination, preference, or prejudice.

The protestants assert that, in the process of grouping commodities under the STCC code, certain liquid chemicals have been incorrectly assigned STCC numbers under the generic heading of industrial gases. The record is inadequate to support definitive findings on this issue, but the respondents will be expected to take appropriate steps to ascertain and rectify any errors which are shown to have occurred.

Liquified petroleum gas.—Objections to the increase of 4 percent on liquified petroleum gas are substantially the same as were presented in Ex Parte No. 256. Attention is called to the industry's contribution of large tank cars and the prospect of diversion of traffic. The respondents point out that mileage allowances on private tank cars were increased in 1964 to compensate shippers for the new and larger equipment, and that incentive rates are published for the use of such cars. For a typical movement of 739 miles, the respondents point out that the proposed increase amounts to 7/10 of a mill per gallon. In southwestern and western trunkline territories, increases in 1965 were made on liquified petroleum gas to partially offset deficits due to the existing scale of rates applicable to that traffic. No persuasive reason appears why this commodity should be exempted from the general increase.

Petroleum products.—Rates on refined petroleum products in packages and in bulk are proposed to be increased 6 percent. Protestants object to the percentage application of the increase, asserting that it will disturb market relationships, and to the increase

on export movements. Increases in port charges due to increased costs, which do not apply on domestic traffic, provide no basis for exempting export traffic from bearing a share of general revenue increases along with all other traffic. Evidence as to market relationships and prospective diversion of traffic is not persuasive. The proposed increases appear reasonable, and necessary reductions to meet specific diversion situations must be met by the respondents as they appear. Rates on petroleum wastes are to be increased 5 percent, minimum 2 cents per hundredweight. It is contended that these increases will result in diversion to barge transportation, or to elimination of movements which will no longer be economically feasible. While this is a low-value commodity no basis appears for exempting it from the general increase.

Chemicals.—Rates on chemicals generally, soda ash, sulphate of ammonia, and vinyl chloride are also proposed to be increased 5 percent, with a minimum of 2 cents per hundred pounds. Rates on chlorine are to be increased 4 percent and on sulphuric acid and anhydrous ammonia, 3 percent, maximum 1 cent per hundredweight, 20 cents per net ton or 22 cents per gross ton.

Protestants assert that the proposed increases will result in diversion of traffic to motor and water transportation, and in the further development of decentralized manufacturing facilities. They introduced evidence to show that rates on chemicals are generally profitable to the respondents and constitute desirable traffic.

The respondents point out that no increase on chemical traffic to and within the South was taken in Ex Parte No. 256, other than on certain TOFC movements. They contend that the average increase on chemicals generally is less than 5 percent, that substantial numbers of requests for reductions in rates on chemicals are handled each year and that most are approved. Rates on movements in jumbo tank cars have been reduced below those for movements in standard tank cars.

The increases on a number of chemical items are challenged as discriminatory and disruptive of established rate relationships. Thus, on aqua ammonia (STCC 28-191-10), an increase of 5 percent, minimum 2 cents per hundredweight, is proposed, while on anhydrous ammonia the proposed increase is 3 percent, maximum 20 cents per net ton. It is contended that, since the former is merely a water solution of the latter, it should take the same increase. It is contended that hydrochloric acid (STCC 28-194-50) should not bear a greater increase than sulphuric acid (STCC 28-

193-15). Similar objections are raised with respect to other materials. Differences in rates caused by the increases do not, standing alone, establish unlawful discrimination. In instances, however, where commodities have customarily been classified together for rate purposes, we do not consider a general rate increase proceeding an appropriate vehicle for altering such existing relationships. Thus, where the same rates have been applicable on items such as cleaning compounds and chlorinated hydrocarbons; or items such as calcium chloride, soda ash, and caustic soda, they should not be altered by the application of the proposed increases. The respondents will be expected to adjust their tariffs as necessary to apply increases on such of these items as have heretofore been rated alike so as to preserve their similar rate application.

Objection is made to the minimum increase of 2 cents per 100 pounds, provided for certain chemicals, including soda ash. It is contended that this results in discrimination against synthetically produced soda ash as compared with natural soda ash, since the former frequently moves over short distances and is thus affected by the minimum increase. Consequences of this nature, which are the product of marketing practices, do not render the rate increase unlawful. The increase applies to both types of soda ash.

As published, the master tariff X-259 applies higher increases to feed grade urea than to fertilizer grade urea. The respondents have expressed a willingness to apply the lower fertilizer grade increase on feed grade urea. Similar corrective action will be taken on isobutane and in other comparable situations. Rates on commodities not assigned specific increases are generally increased 6 percent under item 100 of the master tariff. Shell Oil Company refers to a number of chemicals not listed in the Standard Transportation Commodity Code, which it contends should be grouped under particular numbers therein. Application of the 6-percent increase to these commodities is alleged to be discriminatory where competing products are assesed lesser increases under specific tariff provisions. The respondents will be expected to take prompt action to remedy all such omissions as well as others which are duly called to their attention.

Salt.—Respondents propose to increase their rates on bulk salt by 5 percent, minimum 30 cents per net ton, except to and within the South, where the minimum increase proposed is 20 cents per net ton. On package salt, in all territories, flat increases in cents per 100 pounds are proposed. These amount to 5 cents on rates sub-

ject to minimum carload weights not exceeding 45,000 pounds; 4 cents on rates subject to minimum carload weights exceeding 45,000 pounds and not exceeding 60,000 pounds; and 3 cents on rates subject to minimum carload weights exceeding 60,000 pounds.

Protestants claim that the proposed increases are unreasonable because they are more drastic than the average 5 to 6 percent that the respondents are seeking generally; that in a general increase revenue proceeding there should be no distinction made between bulk and package salt; and that the different minimum increase proposed on bulk salt to and within the South is unjustified. The salt industry is unanimous in claiming that we should grant the respondents only the lowest percentage increase consistent with their proven revenue needs, but in no event greater than 5 percent, maximum 2 cents per 100 pounds, or 40 cents per net ton, and that such increases should be uniform on all interstate and foreign commerce, both from a territorial standpoint and as between bulk salt and package salt.

Carload movements of salt within western territory east of the Continental Divide, southern territory, between those territories, and from official territory to western territory east of the Continental Divide and southern territory, is presently moved under multi-minima, incentive rates, commonly referred to as the "Banner Scales." These rates, initially established in 1962, apply on both package and bulk salt at minima of 45,000, 60,000, 80,000, and 120,000 pounds. While the rates prescribed in *Rate Structure Investigation, Part 13, Salt,* 197 I.C.C. 115 (1933) may still be used,[5] the incentive scales are moving the preponderance of the salt traffic.

Throughout the years the rates on salt have been given special treatment. For example, in the several general increase proceedings beginning with Ex Parte No. 175, *Increased Freight Rates, 1951,* 297 I.C.C. 17, and prior reports, to and including Ex Parte No. 212, *Increased Freight Rates, 1958,* 302 I.C.C. 665, while percentage increases varying from 3 to 15 percent were authorized generally, holddowns of 1 1/2 cents to 3 cents per 100 pounds were imposed on both bulk and package salt. As recognized by us in *Increased Freight Rates, 1958,* 304 I.C.C. 289, 339, the special treatment given to the rates on salt has been a contributing factor

[5] Therein, different percentages of first-class rates were prescribed as maxima on bulk and package salt.

in keeping the rates on salt at a level lower than those on commodities generally.

Respondents here, under the form of a selective increase program, are attempting to maximize their revenues to the fullest extent possible without inviting traffic loss and without disrupting market relationships. The imposition of a minimum increase of only 20 cents per ton in the South was considered necessary because of barge competition. We have heretofore found in our interim report that the increases proposed by respondents will not exceed a maximum just and reasonable level of rates. Respondents claim that only through the use of the minimum on bulk salt and the flat increase on package salt can they receive a pro rata share of their costs from the salt industry. Despite contentions to the contrary, no good reasons have been offered for requiring the rates on bulk and package salt to be kept at the same level. In *Rate Structure Investigation, Part 13, Salt, supra,* the Commission prescribed different levels, based, among other things, on the facts that there was no competition between rock salt, which is predominantly shipped in bulk, and package salt; that each has differing transportation characteristics; and that package salt is of higher value. Protestants have not shown that these characteristics have changed. They claim that the low value of salt has definite limitations as to what the traffic will bear and that failure to provide maximum increases will hurt the smaller shippers of salt to the largest degree and encourage foreign competition. Respondents are ready and willing, voluntarily, to make competitive readjustments. Upon consideration of all the evidence, we are convinced that the rates on both bulk and package salt may be reasonably and otherwise lawfully increased in the amounts proposed by respondents.

Furniture.—The respondents propose to increase the carload commodity rates on furniture on a sliding scale ranging from 4 to 7 percent.[6] General Services Administration, Westinghouse Electric Corporation, and a number of associations representing furniture manufacturers or dealers urge that the respondents have not justified the increases. They object to the different levels of increases, particularly the higher levels for longer hauls. They contend that the cost of moving furniture is also being increased

[6] On rates not exceeding 150 cents per 100 pounds the increase is 4 percent; on rates over 150 cents but not exceeding 200 cents per 100 pounds, 5 percent; on rates over 200 cents but not exceeding 400 cents per 100 pounds, 6 percent; and on rates over 400 cents per 100 pounds, 7 percent.

by more stringent packing requirements and increases in charges for accessorial services. The respondents point out that the lower increases would apply in the short-haul area where motor competition is greatest and that the proposed increases will restore rate relations existing prior to Ex Parte No. 223, resulting in a uniform 7 1/2-percent increase over rates in effect prior to that increase. On articles of furniture weighing between 15 and 100 pounds the transcontinental increase would be between 7 and 46 cents, and for shipments hauled about 2,500 miles the increase would be about 2 cents per car-mile. They contend that risk of diversion is not great since motor carrier rates will be generally higher than the rail rates even with the increase applied. Furniture, it is noted, is high in value and subject to damage. No reason is shown why furniture should not provide a portion of the needed additional revenue. We find the proposed increases on furniture to be just and reasonable.

Household appliances and lighting fixtures.—Rates on these commodities are proposed to be increased 7 percent. Numerous manufacturers and associations of manufacturers oppose the increase, asserting that the traffic returns more than full cost to the railroads, and that diversion of traffic to private carriage is likely. Appliance manufacturers assert that they must compete with automobiles for consumer dollars, and point out that the increase on automobiles is 5 percent. Lighting fixture manufacturers assert that their product is a necessity of life and should be treated in the same fashion as drugs, window glass, soap, fresh vegetables, and canned foods. Neither of these contentions is responsive to the issues in this case. Respondents point out that the products involved are of high value and the loss and damage claims bear a high ratio to gross revenue. The articles are often transported in specialized equipment and the involved industries are shown by the evidence to have rates of return of about 13 percent. Prices charged by the household appliance industry were increased twice in 1967. No reason is shown why these commodities should not bear a portion of the needed additional revenues, nor is there shown any basis for a finding of unjust discrimination, or undue preference, or prejudice. We find the proposed increases on household and electrical appliances and fixtures just and reasonable.

Transformers and turbines.—Rates on electric transformers weighing 75,000 pounds or less which do not have dimensions requiring special type flatcars are proposed to be increased 4 per-

cent. On larger and heavier transformers, the proposed increase is 7 percent. On turbines the proposed increase is 6 percent. Various manufacturers, the National Electric Manufacturers Association and General Services Administration oppose the selective increases, contending that historically transformers and turbines have been given the same rate. They also assert that diversion of traffic to motor or water carriage is likely. Attention is also called to the 5-percent increase proposed for import shipments, asserting that domestic traffic will be prejudiced by the higher increases. Allis Chalmers Manufacturing Company estimates that it has lost 15 to 18 percent of its business to import competition and asserts that the increases will operate to the detriment of domestic shippers and aggravate the balance of payments problem. The respondents introduced evidence to show that only in a few instances are rates on imported transformers lower than domestic, and that the protestants enjoy the same import basis on their export shipments. There is no competitive relationship between transformers and turbines and no reason is shown why increases on these commodities should be related. The higher increase on heavier transformers is needed to meet the particular costs of moving these articles, including special cars, circuitous routing, blockage of adjacent tracks, et cetera. We find the increases proposed on transformers and turbines just and reasonable.

Glass and glass containers.—Rates on glass and glass containers are proposed to be increased 4 percent. The American Glassware Association and Glass Manufacturers Institute, Inc., oppose the increase, contending that it will divert more traffic to trucks. The respondents have published numerous reduced rates on these commodities to meet competition and the average carload rates have trended downward. Production of glass and glassware increased substantially between 1960 and 1966, and the industry as a whole has had a favorable rate of growth. No reason is shown why these commodities should not bear a portion of the needed additional revenue. We find the increase proposed on glass and glass containers just and reasonable.

Metal and plastic containers.—Rates on metal cans and plastic bottles are proposed to be increased 7 percent. The Can Manufacturers' Institute opposes the increase, as well as the increase of 6 percent on can ends and 5 percent, minimum 2 cents per hundred pounds, on tin plate. It seeks a limitation of 4 percent in the increase on cans, similar to that on glass containers, and a limitation on can ends and tin plate of either 4 percent or 5 per-

cent, comparable to cullet and silica sand used as raw materials in the manufacture of the glass containers. Protestants also object to the increase proposed on plastic containers because it exceeds that applied to glass containers, asserting that it will result in diversion of traffic to private and contract motor carriers and in decentralization of the plastic fabricating industry. As noted above, rates on glass containers are depressed by motor competition; and there is no rate relationship between metal and plastic containers and glass containers. Transportation characteristics differ considerably, tin containers loading less than half as heavily as glass containers. There has been a substantial growth in the production and use of both types of containers in recent years. Between 1964 and 1967 plastic bottle shipments increased 42 percent. Pressure packaging in metal containers increased over 15 percent in 1967. While there are areas of competition between these products, the respondents contend that the choice of consumers is dependent upon a number of factors and the impact of differences in freight rates is not of great significance. No reason is shown why these commodities should not bear a portion of the needed additional revenues nor why similar increases should be applied to them or to the raw materials which enter into their manufacture. We find the proposed increases on metal and plastic containers just and reasonable.

Chinaware and earthenware.— Rates on these commodities are proposed to be increased 6 percent. Protestants oppose the increase contending that it should not exceed the 4-percent increase proposed on glassware. While these commodities have many similarities in transportation characteristics, the movement of glassware is many times greater than chinaware. In 1964 rates on china table articles were reduced from $1.22 per hundredweight minimum 24,000 pounds to 77 cents per hundredweight, minimum 40,000 pounds. On an average carload, the rate differences resulting from the proposed increases are little over $7. We find that the proposed increases on chinaware and earthenware are just and reasonable.

Crude abrasives.—Rates on crude abrasives, crude aluminum oxide and crude silicon carbide are proposed to be increased 6 percent. Norton Company opposes the increase to the extent that it exceeds the increases applicable to bauxite ore or calcined or hydrated alumina. Rates on the latter are proposed to be increased 15 cents per ton, net or gross, on rates not exceeding $6.50 per ton, and 25 cents per ton on rates in excess of $6.50 per ton. The

protestant seeks to retain the relationship asserted to exist between bauxite ore and the intermediate products, alumina and aluminum oxide. While such relationships have been retained at times in the past, in Ex Parte No. 212, rates on crude abrasives were increased less than on bauxite ore. There is a substantial difference in the values of crude aluminum oxide and crude silicon carbide on the one hand and calcined alumina and bauxite ore on the other. The former commodities are valued in excess of $135 per ton, while calcined alumina is valued at about $65 per ton, and bauxite ore at less than $10 per ton. No reason is shown why these commodities should be required to take similar increases. We find the proposed increases on crude abrasives just and reasonable.

Ground tripoli.—This commodity is included in item 1005 of the master tariff X-259, which provides for an increase of 6 percent. Protestant Carborundum Company contends that it is an abrasive similar to those included in item 650 and the respondents agree. They have offered to make an appropriate amendment to the tariff so as to reflect the same increase on tripoli as is presently provided for on ground silica. As with other such revisions, hereinbefore mentioned, respondents will be expected to take appropriate action to correct the tariff.

Miscellaneous commodities.—A number of protestants, including Outboard Marine Corporation, The Boeing Company, Aerospace Industries Association of America, Inc., Cities Service Oil Company, FMC Corporation, Steel Shipping Container Institute, Hobby Industry Association of America, Toy Manufacturers of America, Inc., Bicycle Institute of America, and Automobile Manufacturers Association, Inc., oppose the increases on various commodities. These include sewing machines, snow blowers, outboard motor boats, aircraft, aircraft parts, cellulose film, power sprayers, metal barrels, kegs, drums, pails, toys, bicycles, motor vehicles, and motor vehicle parts. They contend that the increases will result in diversion of traffic and, in some instances, that the items now return revenues in excess of out-of-pocket or fully distributed costs. Considering the established need for additional carrier revenue, the contentions of the protestants provide no basis for a finding that any of the commodities in issue should be exempted from bearing their share of the proposed increases.

We have heretofore admonished the respondents, in their use of the STCC publication in connection with tariff adjustments, to promptly correct all instances in which established competitive groupings of commodities have not been observed. Except where

specifically otherwise stated we find the proposed increases just and reasonable. Statements of parties not specifically referred to herein, and concerning commodities not specifically referred to, have been considered in rendering our decision on the proposed increases in freight rates. The findings herein cover all statements and commodities in issue in this proceeding. Requested findings and exceptions not specifically reflected in our findings or conclusions have been considered and found not justified.

The panel of cooperating State commissioners,[7] the Honorable Vernon B. Derrickson of Delaware, the Honorable Charles J. Fain of Missouri and the Honorable Ralph H. Wickberg of Idaho have fully cooperated with the Commission throughout this proceeding and have advised with us in reaching our conclusions. We are authorized to state that they are in substantial accord with this report. The Honorable Edward L. Mason of Florida also participated in the earlier stages of the proceeding but he did not seek reelection and his term expired before our conclusions were reached.

Ultimate Conclusions and Findings

Upon consideration of the entire record in this proceeding, we conclude and find:

1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges, subject to the limitations and exceptions set forth below, are permitted to be continued or to be put into effect.

2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

[7] This panel was selected and appointed by the National Association of (State) Regulatory Utility Commissioners, upon invitation by this Commission, at the outset of this proceeding and were designed to be representative geographically of the eastern, midwestern, western, and southern areas involved in this proceeding.

3. Respondents may justly and reasonably be permitted to continue and to establish the increased interstate freight rates and charges approved in our interim report, except that in certain instances, for reasons stated in this report, different increases are shown to be just and reasonable, in which cases our prior ultimate findings are modified and the increases authorized are as set forth in findings 4 to 12, inclusive.

4. Respondents' basic freight rates and charges may be increased generally in accordance with the proposals as set forth in Tariff of Increased Rates and Charges, X-259, issued March 11, 1968, as amended. By basic freight rates and charges are meant those in effect on June 23, 1968, whether established by order of the Commission or voluntary act of the petitioning carriers (including rates held under investigation and suspension orders). Basic freight rates and charges include also rates prescribed by outstanding order of the Commission when and as the rates therein prescribed become effective.

5. Minimum net line-haul revenue requirements for absorption of charges for switching at St. Louis, Mo., and East St. Louis, Ill., may be increased not more than 6 percent over those in effect on June 23, 1968.

6. On pig iron and iron and steel scrap, no greater percentage increase may be made in the basic rates than is made in the rates on iron ore in effect on the same date, nor shall the maximum increase per ton made on pig iron and iron and steel scrap exceed that made on iron ore.

7. On nonferrous scrap, the minimum increase in the basic rates shall not exceed 1 cent per 100 pounds, 20 cents per net ton, or 22 cents per gross ton.

8. On grain and grain products in the West, no greater percentage increase may be made in the basic rates for the initial rail movement from the country origin to the primary market than the lowest percentage increase made in the basic through rates from such country origin to a destination beyond such primary market.

9. On shelled walnuts the increase in the basic rates shall not exceed that applied to walnuts in the shell.

10. On vegetable oils and commodities grouped therewith in item 685, the increase in the basic rates shall not exceed that published for lard in item 595.

11. On potash, basic rates may be increased no more than 3 percent.

12. On fly ash, basic rates may be increased no more than 3 percent.

13. The increased freight rates and charges authorized herein will not exceed a maximum reasonable level, and the revenues derived therefrom will result in earnings and rates of return for the railways, as a whole and by the usual groupings, not in excess of that required to enable them to render adequate and efficient transportation at the lowest cost consistent with the furnishing of such service.

14. The increased freight rates and charges authorized herein will have no undue adverse effect on the movement of traffic by railway.

15. Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act.

16. An appropriate order will be entered (1) requiring the cancellation of the schedules under investigation herein found not justified, without prejudice to the establishment and maintenance of schedules in conformity with the findings herein, and (2) modifying all our outstanding orders to the extent necessary to permit the maintenance of the increased freight rates and charges herein authorized, and granting relief from the provisions of section 4 of the act and our tariff publishing rules as may be necessary, including authority to publish and file tariff changes on not less than 5 days' notice.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of January 1969.

Ex Parte No. 259

INCREASED FREIGHT RATES, 1968

The Commission having this day made a report on further investigation containing its findings of fact and conclusions thereon, which report, and its prior

report and order of November 25, 1968, 332 I.C.C. 590, are hereby referred to and made a part hereof:

It is ordered, That the respondent railroads insofar as they participate in the traffic and have increased their rates, charges and minimum revenue requirements, as authorized in the Commission's order of November 25, 1968, shall cease and desist on or before February 15, 1969, from collecting basic rates increased to a greater extent than found just and reasonable herein, and from requiring minimum line-haul revenues as prerequisite to absorption of switching charges increased to a greater extent than found just and reasonable herein;

It is further ordered, That the respondent railroads be, and they are hereby, required to cancel the schedules suspended and placed under investigation by the order of June 19, 1968, to the extent not approved herein, on or before February 15, 1969, upon not less than 5 days' notice to the Commission and the general public by filing and posting in the manner prescribed by the Commission under the Interstate Commerce Act, without prejudice to the establishment and maintenance of schedules in conformity with the findings herein;

It is further ordered, That further changes in freight rates and charges, to the extent authorized herein, may be made effective upon not less than 5 days' notice to the Commission and to the general public, by filing and posting in the manner prescribed in the act;

It is further ordered, That outstanding orders in other proceedings are hereby modified so as to permit establishment of the further changes in interstate freight rates and charges herein authorized;

It is further ordered, That all tariff schedules changing interstate rates or charges under the authority of this order, which rates and charges are now maintained or held in force by virtue of outstanding orders of the Commission, shall make specific reference to this order;

And it is further ordered, That the order entered herein on June 19, 1968, be, and it is hereby vacated and set aside; and that this proceeding be, and it is hereby, discontinued.

SECOND SUPPLEMENTAL FOURTH SECTION ORDER NO. 20213

It appearing, That, the Commission, by fourth-section order No. 20213 entered June 19, 1968, as modified by supplemental fourth-section order No. 20213 entered November 25, 1968, authorized carriers parties to the proceeding, Ex Parte No. 259, *Increased Freight Rates, 1968,* 332 I.C.C. 590, to establish and maintain the increased rates and charges described therein without observing the provisions of section 4 of the Interstate Commerce Act;

It further appearing, That the Commission on this date has entered its further report in the same proceeding, authorizing certain increases and limiting other increases in rates and charges for the transportation of property over the lines of carriers parties to the proceeding within the United States, and that such increases or limitations cannot be published and made effective without producing in some instances rates or charges which yield greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, or greater compensation as a through rate or charge than the aggregate of intermediate rates or charges subject to the act, in contravention of section 4

thereof; and that carriers parties to the proceeding have applied for relief from the provisions of section 4 to the extent necessary to establish the approved increased rates and charges, which fourth section order, as amended, prior orders in Ex Parte No. 259, the prior report, and the report of this date are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 20213, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding the following ordering paragraphs thereto:

It is further ordered, That carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby authorized to depart from the provisions of section 4 of the act to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte No. 259 of this date, January 9, 1969.

It is further ordered, That carriers parties to said proceeding be, and they are hereby, authorized to establish and maintain rates and charges authorized in the order of this date, January 9, 1969, without observing the long-and-short-haul provision of section 4 of the act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by failure of the State authorities to authorize the full increases permitted in said proceeding.

And it is further ordered, That in those instances in which rates and charges in contravention of section 4 of the act are established under the authority contained herein, the schedules containing such rates and charges shall make reference to this order in the manner required by rule 28 of Tariff Circular No. 20.

AMENDMENT OF SPECIAL PERMISSION NO. 68-4000 WAIVER OF TARIFF PUBLISHING RULES

It appearing, That on March 8, 1968, the Commission entered Special Permission No. 68-4000, amended June 19, 1968, authorizing carriers parties to the above proceeding to depart, to the extent specified in said special permission, from the Commission's tariff rules in publishing increases in freight rates and charges as provided for in such special permission, as amended.

It is ordered, That said special permission, as amended, be, and it is hereby, further amended to permit the establishment, in the same manner and subject to the same limitations, including the expiration date, as therein provided, of the changed increases in freight rates and charges authorized by the Commission in its report and order of this date, January 9, 1969, in said proceeding.

By the Commission.

H. NEIL GARSON,

(SEAL) *Secretary.*

APPENDIX D

5 U.S.C. § 551.

For the purpose of this subchapter–

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include–

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title–

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by section 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect

designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

5 U.S.C. § 702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 704.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form or reconsideration, or, unless the agency otherwise

requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

28 U.S.C. § 1336.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

49 U.S.C. § 13(1).

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

49 U.S.C. § 15(1).

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing

under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

49 U.S.C. § 15(7).

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the Commission shall have, and it is

given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice; after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the

Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

49 U.S.C. § 15a(2).

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

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In The

Supreme Court of the United States

October Term, 1969

No. [redacted] 78

Atlantic City Electric Company, et al.,

Appellants

v.

United States of America and Interstate Commerce Commission, et al.,

Appellees

On Appeal from the United States District Court for the Southern District of New York

Jurisdictional Statement Filed January 16, 1970

No. [redacted] 106

Alabama Power Company, et al.,

Appellants

v.

United States of America and Interstate Commerce Commission, et al.,

Appellees

On Appeal from the United States District Court for the District of Columbia

Jurisdictional Statement Filed March 5, 1970

Probable Jurisdiction in Both Cases Noted, and Cases Consolidated for Argument May 18, 1970

CONSOLIDATED APPENDIX

IN THE

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October Term 1969

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ATLANTIC CITY ELECTRIC COMPANY, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION ET AL.,
Appellees

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No. 1283

ALABAMA POWER COMPANY, ET AL.,

Appellants

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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February 28, 1969—Plaintiffs' complaint filed in United States District Court for Southern District of New York

April 24, 1969—Class I Railroads of United States filed motion to intervene, memorandum in support thereof and proposed answer

April 29, 1969—Motion of State of New York and Departments of Agriculture of States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts to Intervene and Proposed Complaint filed

May 2, 1969—Answer of Defendant Interstate Commerce Commission filed

May 7, 1969—Answer of Defendant United States of America filed

May 8, 1969—Order of Hon. Charles M. Metzner, United States District Judge, permitting the intervention and the filing of the complaint of the State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts signed

May 8, 1969—Order of Hon. Charles M. Metzner, United States District Judge, permitting the intervention and the filing of the answer of the Class I Railroads of the United States signed

May 22, 1969—Motion of Plaintiffs for Appointment of Three Judge Statutory Court filed

May 23, 1969—Statement of Position of Interstate Commerce Commission on Plaintiffs' Motion filed

June 4, 1969—Order of Hon. J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit designating members of three-judge statutory court signed

June 19, 1969—Answer of Defendant Interstate Commerce Commission to the Intervening Plaintiffs' Complaint filed

July 8, 1969—Motion to Dismiss Action by Defendant Interstate Commerce Commission and Memorandum in Support Thereof filed

July 8, 1969—Memorandum of Railroads in Support of Defendant Interstate Commerce Commission's Motion to Dismiss filed

July 28, 1969—Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss Plaintiffs' Complaint filed

July 28, 1969—Intervening Plaintiffs' Memorandum in Opposition to Motion to Dismiss filed

August 4, 1969—Reply Memorandum of Defendant Interstate Commerce Commission and of Railroad Intervenors in Support of Motion to Dismiss

August 6, 1969—Oral argument held before Hon. Irving Kaufman, C.J., Hon. Dudley Bonsal, D.J. and Hon. Edward McLean, D.J.

October 28, 1969—Opinion of Three Judge Court granting Interstate Commerce Commission's Motion filed. So ordered

December 18, 1969—Notice of Appeal to Supreme Court of United States filed

December 31, 1969—Order of Hon. Edward McLean directing transfer of original record to the Supreme Court of the United States filed

Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

ATLANTIC CITY ELECTRIC COMPANY, CENTRAL HUDSON GAS & ELECTRIC CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NIAGARA MOHAWK POWER CORPORATION, ORANGE & ROCKLAND UTILITIES, INC., PUBLIC SERVICE ELECTRIC & GAS COMPANY, ROCHESTER GAS & ELECTRIC CORPORATION,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

69 CIV. 800

Plaintiffs above named, complaining by their attorneys, LeBoeuf, Lamb, Leiby & MacRae, for their complaint herein allege:

1. Plaintiffs bring this action to suspend, enjoin, annul and set aside the order of the Interstate Commerce Commission (hereinafter "ICC") of January 23, 1969 (hereinafter "the Order") which Order incorporates and makes a part thereof the interim order of the ICC issued November 26, 1968 in a proceeding held before it entitled "Ex Parte 259, Increased Freight Rates, 1968." Each of the above named plaintiffs was a party to the proceedings before the ICC which resulted in said Order and out of which the present action arises.

2. The jurisdiction of this Court is founded upon 5 U.S.C. § 703 and 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325. The United States of America is named as statutory defendant pursuant to 28 U.S.C. § 2322.

3. The above plaintiffs hereby petition this Court for the convening of a 3-judge court as required by 28 U.S.C. § 2325.

4. The plaintiffs herein are the following:

a. Atlantic City Electric Company is a public utility incorporated under the laws of the State of New Jersey, whose principal place of business is 1600 Pacific Avenue, Atlantic City, N. J. 08404, providing electric service to some 733,000 consumers in southern New Jersey.

b. Central Hudson Gas & Electric Corporation is a public utility incorporated under the laws of the State of New York, whose principal place of business is 284 South Avenue, Poughkeepsie, New York, 12602, providing electric service in the area of Central New York State to some 460,000 consumers.

c. Consolidated Edison Company of New York, Inc. is a public utility incorporated under the laws of the State of New York, whose principal place of business is 4 Irving Place, New York, N. Y. 10003, providing electric service in the City of New York and in Westchester County, to some 9,000,000 consumers.

d. Niagara Mohawk Power Corporation is a public utility incorporated under the laws of the State of New York, whose principal place of business is 300 Erie Boulevard West, Syracuse, New York 13202, providing electric service in northern New York State to approximately 3,500,000 consumers.

e. Orange and Rockland Utilities, Inc. is a public utility incorporated under the laws of the State of New York, whose principal place of business is 10 North Broadway, Nyack, New York, 10960, providing electric service in south central New York State and adjacent counties in New Jersey and Pennsylvania to some 520,000 consumers.

f. Public Service Electric & Gas Company is a public utility organized under the laws of the State of New Jersey, whose principal place of business is 80 Park Place, Newark, New Jersey 07101, providing electric service in the central corridor of northern and southern New Jersey, to some 4,200,000 consumers.

g. Rochester Gas & Electric Corporation is a public utility organized under the laws of the State of New York, whose principal place of business is 89 East Avenue, Rochester, N. Y., 14604, providing electric service in upstate New York State to some 245,000 customers in a service area where some 750,000 people live.

5. Each and all of the plaintiffs are engaged in the business of generating and supplying electricity as regulated public utilities and in the course of such business, purchase, ship by rail in interstate commerce, and consume, large quantities of bituminous steam coal. As more fully set forth below, the prices to be paid by the plaintiffs and each of them for shipping said coal will be materially affected and increased by the Order, since that Order will require them to pay approximately two million seven hundred thousand ($2,700,000) dollars additional annually for the shipment of such coal.

6. The Order permits the Class I railroads of the United States to put into effect freight rate increases proposed by such railroads, which increases range from 3%

to 10% on virtually all commodities shipped within the United States and specificially authorizes an increase of 5% in freight rates on bituminous steam coal, subject to 15 cents per ton maximum increase. The Order was the final administrative decision in the Ex Parte 259 proceeding which was commenced by the Class I railroads of the United States on March 7, 1968, when those railroads filed a petition with the ICC requesting an order enabling them to put into effect the above increases. The ICC granted the railroads' petition on the following day, March 8, 1968, despite the objections raised by shippers and by the United States Departments of Agriculture and Transportation. The ICC's March 8th order permitted the railroads to publish Master Tariff X-259 containing the proposed increases to become effective May 24, 1968. The ICC also decided to inquire into the proposed increased rates in the intervening period. Such inquiry consisted of the submission of written verified statements by the railroads and the protesting shippers. No cross-examination of any party was had, but oral argument in which plaintiffs' attorneys participated took place on June 13 and 14, 1968. On June 19, 1968, the ICC suspended Master Tariff X-259 to and including January 23, 1969, at the same time permitting the railroads to increase freight rates on all commodities by 3% and ordering hearings on the proposed increases. Such hearings were concluded on October 8, 1968, and without oral argument respecting said hearings, the interim order and the Order were entered, as above stated, on November 26, 1968 and on January 23, 1969 respectively.

7. All administrative remedies have been exhausted (5 U.S.C. §704).

8. The plaintiffs have standing to bring this action as persons aggrieved under 5 U.S.C. §702.

9. The Order is unlawful and in violation of the Interstate Commerce Act (49 U.S.C. §§1 et seq.) and the Administrative Procedure Act (5 U.S.C. §§551, et seq.), in that it permits the railroads to put into effect their proposed selective rate increases without evidence in the record as to the justness and reasonableness of such rates, without the ICC having reviewed the railroads' petition upon a proper record, without the ICC having performed the affirmative duty which the Interstate Commerce Act imposes upon the ICC, which duty is to itself examine into the justness, reasonableness and other aspects of such proposed increases, and without the ICC having afforded to plaintiffs their rights to procedural due process as guaranteed by the Constitution of the United States.

10. Despite motion having been duly made during the proceeding before the ICC by one of the parties thereto, the United States Department of Agriculture, for joinder of the ICC's Bureau of Accounts as a party (which motion was denied), no Bureau, Section member or employee of the ICC was a party to the proceeding before it, nor was there any representation of the public interest advanced by the ICC through its counsel or otherwise at any time throughout the proceeding.

11. The ICC failed to order its presiding examiners to make preliminary decisions on the matter before them and afford plaintiffs the opportunity to propose findings, conclusions or take exceptions thereto, without stating on the record that this procedure was eliminated because of the necessity of the due and timely execution of its functions, in direct contravention of the requirements of 5 U.S.C. §557.

12. Although the Interstate Commerce Act requires that all rates shall be just, reasonable and non-discriminatory, (49 U.S.C.1(5) and 3(1)), the ICC permitted the railroads to put into effect increases in varying amounts upon different commodities, with no evidence as to the present cost to the railroads for providing the transportation services involved with respect to any commodity. Such evidence was requested by plaintiffs herein at various times throughout the proceedings, but repeatedly refused by the railroads and such refusal was upheld by the ICC's presiding examiners, and by the ICC.

13. Notwithstanding the fact that §15a(2) (49 U.S.C. §15a(2)) requires the ICC to give due consideration to the adverse effect of increased railroad rates upon the movement of traffic, the ICC allowed these increased freight rates to be put into effect with no evidence in the record to rebut the voluminous, specific and detailed evidence presented by shippers, including plaintiffs, that substantial loss of traffic would result from the proposed increases. The ICC based its findings in this regard on (a) the completely unsupported opinions and observations that with respect to the coal traffic with which these plaintiff-shippers are concerned, "costs of other forms of transportation, and of competing fuels are also increasing" (332 I.C.C. 734) for which statement there is no supporting evidence; and (b) the explicit assumption that "should competitive situations arise, appropriate adjustments can be made by producers and carriers" (332 I.C.C. 734). There exists not a scintilla of evidence in the record to support an assumption that "adjustments can be made by producers" of coal that will obviate losses and diversions of traffic from the railroads. By thus effectively delegating to the carriers sole discretion to determine which adjustments would be appro-

priate to meet competitive situations, the ICC abdicated to the railroads its function and duty statutorily imposed under §15a(2).

14. The Order is also unlawful because it permits the railroads to file varying rate increases on different commodities with no evidence presented by the railroads to justify an increase of 5% on coal as compared, for example, to 3% on certain other commodities. Furthermore, this increase was permitted in the face of substantial and uncontroverted evidence that coal traffic, prior to such increase, produced a disproportionate return to the carriers over and above the costs to them of providing that service. The order, in determining that cost of service for a commodity group or movement is an irrelevant factor in a rate proceeding, has merely established the test of "what the market can bear" as the governing principle herein and, as set forth above, has then proceeded to abdicate to the carriers the ICC's statutory function of determining just, reasonable and non-discriminatory rates.

WHEREFORE, it is respectfully requested that this Court permanently enjoin, suspend, annul and set aside the Order of the ICC of January 23, 1969 and grant such other and further relief as it deems appropriate in the circumstances.

Respectfully submitted,

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Motion of Aberdeen and Rockfish Railroad Company, et al. For Leave To Intervene As Defendants

In The

United States District Court

For the Southern District of New York

69 Civil Action 800

[Title Omitted in Printing]

Come now Aberdeen and Rockfish Railroad Company and the railroads and carriers named in Appendix A hereto, which railroads and carriers are hereinafter referred to as railroads, and hereby move this court for an order permitting their intervention as defendants in this case. In support of this motion it is respectfully shown:

I

By the complaint herein plaintiffs seek to enjoin and set aside an order of the Interstate Commerce Commission entered January 23, 1969 in a proceeding before that Commission entitled *"Ex Parte No. 259, Increased Freight Rates, 1968."*

II

These railroad movants were parties to the proceeding before the Commission in *Ex Parte No. 259, Increased Freight Rates, 1968,* that proceeding having been concerned with increased freight rates proposed by these railroads to offset increased costs.

III

That pursuant to 28 U.S.C. §2323 and Rule 24(a) of the Rules of Civil Procedure for the United States District

Courts these railroad movants as parties of interest in the proceeding before the Interstate Commerce Commission are accorded a statutory right to intervene.

IV

That a similar suit to set aside the orders of the Interstate Commerce Commission in *Ex Parte No. 259, Increased Freight Rates, 1968,* was filed on November 27, 1968 in the United States District Court, District of Columbia, in a case entitled *Alabama Power Company v. United States,* CA 2970-68, and that in that case the court has permitted these railroad movants to intervene as defendants.

Wherefore, these railroad movants pray that an order be entered permitting them intervention as defendants and permitting the filing of their answer attached hereto.

Respectfully submitted,

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Appendix A to Railroads' Motion to Intervene

LIST OF RAILROADS AND CARRIERS WHICH MOVE FOR LEAVE TO INTERVENE AS DEFENDANTS.

Aberdeen and Rockfish Railroad Company
Abilene & Southern Railway Company
Alnapee and Western Railway Company (The)
Akron & Barberton Belt Railroad Company (The)
Akron, Canton & Youngstown Railroad Company (The)
Alabama Great Southern Railroad Company (The)
Alabama, Tennessee and Northern Railroad Company
Albany and Northern Railroad Company
Algers, Winslow and Western Railway Company
Aliquippa and Southern Railroad Company
Alton and Southern Railroad
Angelina & Neches River Railroad Company
Ann Arbor Railroad Company (The)
Apache Railway Company (The)
Apalachicola Northern Railroad Company
Arcade and Attica Railroad Corporation
Arcata and Mad River Rail Road Company (The)
Arkansas & Louisiana Missouri Railway Company
Arkansas Western Railway Company (The)
Aroostook Valley Railroad Company
Ashley, Drew & Northern Railway Company
Atchison, Topeka & Santa Fe Railway Company (The)
Atlanta & Saint Andrews Bay Railway Company
Atlanta and West Point Rail Road Company
Atlantic and East Carolina Railway Company
Atlantic and Western Railway Company

Baltimore and Annapolis Railroad Company (The)
Baltimore and Eastern Railroad Company
Baltimore and Ohio Chicago Terminal Railroad Company (The)

Appendix A to Railroads' Motion to Intervene

Baltimore and Ohio Railroad Company (The)
Bangor and Aroostook Railroad Company
Bath and Hammondsport Railroad Company
Bauxite & Northern Railway Company
Beaver, Meade and Englewood Railroad Company
Beech Mountain Railroad Company
Belfast and Moosehead Lake Railroad Company
Bellefonte Central Railroad Company
Belton Railroad Company
Belt Railway Company of Chicago (The)
Bessemer and Lake Erie Railroad Company
Bevier & Southern Railroad Company
Birmingham Southern Railroad Company
Bonhomie and Hattiesburg Southern Railroad Company
Boston and Maine Corporation
Boston & Maine Transportation Company
Boyne City Railroad Company
British Columbia Hydro & Power Authority
Brooklyn Eastern District Terminal
Buffalo Creek Railroad Company (The) (Erie Lackawanna Railway Company and Lehigh Valley Railroad Company, Lessees)
Bush Terminal Railroad Company
Butte, Anaconda & Pacific Railway Company

Cadillac & Lake City Railway Company
Cadiz Railroad Company
California Western Railroad
Camas Prairie Railroad Company
Cambria and Indiana Railroad Company
Camp Lejeune Railroad Company
Canadian National Railways
Canadian Pacific Railway Company

Appendix A to Railroads' Motion to Intervene

Canadian Pacific Railway Lines in Maine
Canadian Pacific Railway Lines in Vermont
Canton Railroad Company
Carolina and Northwestern Railway Company
Carolina, Clinchfield and Ohio Railway: Carolina, Clinchfield and Ohio Railway of South Carolina, Lessees: Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company
Cedar Rapids and Iowa City Railway Company
Central California Traction Company
Central Indiana Railway Company
Central of Georgia Railway Company
Central Railroad Company of New Jersey (The) (John E. Farrell, Trustee)
Central Vermont Railway, Inc.
Chattahoochee Industrial Railroad
Chattahoochee Valley Railway Company
Chattanooga Traction Company
Chesapeake and Ohio Railway Company (The)
Chesapeake Western Railway
Chestnut Ridge Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago & Illinois Midland Railway Company
Chicago & Illinois Western Railroad
Chicago and North Western Railway Company
Chicago and Western Indiana Railroad Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago Heights Terminal Transfer Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago River and Indiana Railroad Company (The)
Chicago, Rock Island and Pacific Railroad Company

Chicago Short Line Railway Company
Chicago South Shore and South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Cincinnati, New Orleans and Texas Pacific Railway Company (The)
City of Prineville Railway
Claremont & Concord Railway Company, Inc.
Clarendon and Pittsford Railway Company (The)
Cliffside Railroad Company
Colorado and Southern Railway Company (The)
Colorado & Wyoming Railway Company (The)
Columbia & Cowlitz Railway Company
Columbia, Newberry and Laurens Railroad Company
Columbus and Greenville Railway Company
Conemaugh & Black Lick Railroad Company
Corinth and Counce Railroad Company (The)
Coudersport and Port Allegany Railroad Company
Curtis Bay Railroad Company
Cuyahoga Valley Railway Company (The)

Dansville and Mount Morris Railroad Company (The)
Delaware and Hudson Railroad Corporation (The)
Delray Connecting Railway Company
Delta Valley and Southern Railway Company
Denver and Rio Grande Western Railroad Company (The)
DeQueen and Eastern Railroad Company
Des Moines and Central Iowa Railway Company
Detroit and Mackinac Railway Company
Detroit and Toledo Shore Line Railroad Company (The)
Detroit Terminal Railroad Company
Detroit, Toledo and Ironton Railroad Company
Doniphan, Kensett & Searcy Railway
Duluth & Northeastern Railroad Company
Duluth, Missabe and Iron Range Railway Company

Appendix A to Railroads' Motion to Intervene

Duluth, Winnipeg and Pacific Railway Company

East Erie Commercial Railroad
East Jersey Railroad and Terminal Company
East St. Louis Junction Railroad Company
East Tennessee and Western North Carolina Railroad Company
East Washington Railway Company
Elgin, Joliet and Eastern Railway Company
Erie-Lackawanna Railway Company
Escanaba and Lake Superior Railroad Company
Everett Railroad Company

Fairport, Painesville and Eastern Railroad Company (The)
Fernwood, Columbia and Gulf Railroad Company
Florida East Coast Railway Company
Fonda, Johnstown and Gloversville Railroad Company
Fore River Railroad Corporation
Fort Dodge, Des Moines & Southern Railway Company
Fort Myers Southern Railroad Company
Fort Smith and Van Buren Railway Company
Fort Worth and Denver Railway Company
Frankfort & Cincinnati Railroad Company

Gainesville Midland Railroad Company
Genesee and Wyoming Railroad Company
Georgetown Railroad Company
Georgia & Florida Railway Company
Georgia, Ashburn, Sylvester & Camilla Railway Company
Georgia Northern Railway Company (The)
Georgia Rail Road & Banking Company, Operated as the Georgia Railroad by Lessees: Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company

Appendix A to Railroads' Motion to Intervene

Georgia Southern and Florida Railway Company
Grafton and Upton Railroad Company
Grand Trunk Railway System (Line in the United States East of the West Bank of The Detroit and St. Clair Rivers), comprising the following carrier: Canadian National Railway Company
Grand Trunk Western Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Northern Railway Company
Green Bay and Western Railroad Company
Green Mountain Railway Corporation
Greenville and Northern Railway Company
Greenwich & Johnsonville Railway Company
Gulf, Mobile and Ohio Railroad Company
Gulf Transport Company

Hampton & Branchville Railroad Company
Harriman and Northeastern Railroad Company
High Point, Thomasville & Denton Railroad Company
Hoboken Shore Railroad
Hollis & Eastern Railroad Company
Holton Inter-Urban Railway Company
Hoosac Tunnel and Wilmington Railroad Company
Hutchinson and Northern Railway Company (The)

Illinois Central Railroad
Illinois Northern Railway
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company
Indianapolis Union Railway Company (The)
Interstate Railroad Company
Iowa Terminal Railroad Co.
Ironton Railroad Company (The) (Lehigh Valley Railroad Company and Reading Company, Lessees)

Appendix A to Railroads' Motion to Intervene

Johnstown and Stony Creek Rail Road Company

Kanawha Central Railway Company (The)
Kansas City Public Service Freight Operation
Kansas City Southern Railway Company (The)
Kansas, Oklahoma & Gulf Railway Company (The)
Kelley's Creek and Northwestern Railroad Company
Kentucky & Indiana Terminal Railroad Company
Kentucky and Tennessee Railway
Kewaunee, Green Bay and Western Railroad Company

Lackawanna and Wyoming Valley Railroad Company
Lake Erie and Eastern Railroad
Lake Erie and Ft. Wayne Railroad
Lake Erie, Franklin & Clarion Railroad Company
Lakefront Dock and Railroad Terminal Company (The)
Lake Superior & Ishpeming Railroad Co.
Lake Terminal Railroad Company (The)
Laona & Northern Railway Company
LaSalle and Bureau County Railroad Company (The)
Laurinburg and Southern Railroad Company, Inc.
Lehigh and Hudson River Railroad Company (The)
Lehigh and New England Railroad Company
Lehigh Valley Railroad Company
Live Oak, Perry & Gulf Railroad Company
Livonia, Avon & Lakeville Railroad Corporation
Long Island Rail Road Company (The)
Longview, Portland & Northern Railway Company
Lorain & West Virginia Railway Company
Louisiana & Arkansas Railway Company
Louisiana and North West Railroad Company (The)
Louisiana and Pine Bluff Railway Company (The)
Louisiana Southern Railway Company
Louisville and Nashville Railroad Company

Louisville and Wadley Railway Company
Lowville and Beaver River Railroad Company (The)
Ludington & Northern Railway

Maine Central Railroad Company
Manistique and Lake Superior Railroad Company
Manufacturers' Junction Railway Company
Manufacturers Railway Company
Marinette, Tomahawk & Western Railroad Company
Maryland and Pennsylvania Railroad Company
Massena Terminal Railroad Company (The)
McCloud River Railroad Company
McKeesport Connecting Railroad Company
Meridian & Bigbee Railroad Company
Middle Fork Railroad Company
Middletown and New Jersey Railway Company, Inc.
Midland Continental Railroad
Midway Railroad Company
Minneapolis, Anoka and Cuyana Range Railroad Company
Minneapolis Industrial Railway Company
Minneapolis, Northfield and Southern Railway
Minnesota, Dakota & Western Railway Co.
Mississippi & Skuna Valley Railroad Company
Mississippi Export Railroad Company
Missouri Illinois Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Modesto and Empire Traction Company
Monongahela Connecting Railroad Company (The)
Monongahela Railway Company (The)
Monon Railroad
Montana Western Railway (The)
Montour Railroad Company

Appendix A to Railroads' Motion to Intervene

Montpelier & Barre Railroad Company
Morehead and North Fork Railroad Company
Morristown & Erie Railroad Company
Moscow, Camden & San Augustine Railroad
Moshassuck Valley Railroad Company
Mount Hope Mineral Railroad Company
Muncie and Western Railroad Company

Narragansett Pier Railroad Company, Inc. (The)
Napierville Junction Railway Company
Nevada Northern Railway Co.
Newburgh and South Shore Railway Company (The)
New Hope & Ivyland Railroad Company
New Jersey, Indiana & Illinois Railroad Company
New Orleans Lower Coast Railroad Company
New Orleans Terminal Company
New River Railway Company
New York and Long Branch Railroad Company (The)
New York Connecting Rail Road Company (The)
New York Dock Railway
New York, Susquehanna and Western Railroad Company
Niagara Junction Railway Company
Norfolk & Portsmouth Belt Line Railroad
Norfolk and Western Railway Company
Norfolk, Franklin and Danville Railway Company
Norfolk Southern Railway Company
Northampton and Bath Railway Company
Northern Pacific Railway Company
Norwood & St. Lawrence Railroad Company

Ogdensburg & Norwood Railway Co.
Omaha, Lincoln and Beatrice Railway Company
Oregon & Northwestern Railroad Company

Appendix A to Railroads' Motion to Intervene

Oregon, California & Eastern Railway Company
Oregon Electric Railway Company
Oregon Trunk Railway
Owasco River Railway (The)

Pacific Coast R.R. Co.
Pacific Great Eastern Railway Company
Patapsco & Back Rivers Railroad Company
Pecos Valley Southern Railway Company (The)
Pennsylvania and Atlantic Railroad Company (Note)
(Note: South of Highstown, N. J. to Pemberton, N. J., incl.) (The Union Transportation Company, Lessee)
Penn Central Company
Pennsylvania-Reading Seashore Lines
Peoria & Eastern Railway
Peoria and Pekin Union Railway Company
Petaluma and Santa Rosa Railroad Company
Philadelphia, Bethlehem and New England Railroad Company
Piedmont and Northern Railway Company
Pioneer and Fayette Railroad Company (The)
Pittsburg & Shawmut Railroad Company (The)
Pittsburgh, Allegheny & McKees Rocks Railroad Company
Pittsburgh and Lake Erie Railroad Company (The)
Pittsburgh and Ohio Valley Railway Co.
Pittsburgh, Chartiers & Youghiogheny Railway Company
Point Comfort & Northern Railway Company
Port Huron and Detroit Railroad Company
Portland Terminal Company
Portland Traction Company (Portland Railroad and Terminal Division)
Port of Tillamook Bay Railroad
Port Townsend Railroad

Appendix A to Railroads' Motion to Intervene

Prescott and Northwestern Railroad Company (The)
Quanah, Acme & Pacific Railway Company
Quebec Central Railway Company

Railway Valley Company (Railway Valley Company, Lessee)
Raritan River Rail-Road Company
Reader Railroad
Reading Company
Richmond, Fredericksburg and Potomac Railroad Company
River Terminal Railway (The)
Rockdale, Sandow & Southern Railroad Company
Roscoe, Snyder and Pacific Railway Company
Rosslyn Connecting Railroad Company

Sabine River & Northern Railroad Company
Sacramento Northern Railway
St. Johnsbury & Lamoille County Railroad
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
Salt Lake, Garfield and Western Railway Company
Sandersonville Railroad Company
San Diego & Arizona Eastern Railway Company
Sand Springs Railway Company
San Luis Central Railroad Company (The)
Santa Maria Valley Railroad Company
Savannah & Atlanta Railway Company
Savannah State Docks Railroad Company
Seaboard Coast Line Railroad Company
Sierra Railroad Company
Skaneateles Short Line Railroad Corporation
Soo Line Railroad Company

South Brooklyn Railway Company
South Buffalo Railway Company
Southern Indiana Railway, Inc.
Southern New York Railway, Incorporated
Southern Pacific Company
Southern Railway Company
Southern San Luis Valley Railroad Company
South Georgia Railway Company (The)
Spokane International Railroad Company
Spokane, Portland and Seattle Railway Company
Springfield Terminal Railway Company (Vermont)
Staten Island Rapid Transit Railway Company (The)
State University Railroad Company
Steelton & Highspire Railroad Company
Stewartstown Railroad Company (The)
Stockton Terminal and Eastern Railroad
Strasburg Rail Road Company
Strouds Creek and Muddlety Railroad
Sumter & Choctaw Railway Company
Sunset Railway

Tampa Southern Railroad Company
Tavares and Gulf Railway Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railroad Company
(Samuel Spencer and Sam A. Blair, Receivers)
Terminal Railroad Association of St. Louis
Texas & Northern Railway Company
Texas and Pacific Railway Company (The)
Texas Central Railroad Co.
Texas, Oklahoma & Eastern Railroad Company
Texas Mexican Railway Company (The)
Texas-New Mexico Railway Company
Texas South-Eastern Railroad Company

Tidewater Southern Railway Company
Toledo, Angola & Western Railway Company (The)
Toledo, Peoria & Western Railroad Company
Toledo Terminal Railroad Company (The)
Tooele Valley Railway Company
Toronto, Hamilton and Buffalo Railway Company (The)
Trenton-Princeton Traction Company
Trona Railway Company
Tulsa-Sapulpa Union Railway Company
Twin Branch Railroad Company

Union Freight Railroad Company
Union Pacific Railroad Company
Union Railroad Company
Unity Railways Company
Upper Merion and Plymouth Railroad Company

Valdosta Southern Railroad Company
Valley & Siletz Railroad Company
Ventura County Railway Company
Vermont Railway, Inc.
Virginia Blue Ridge Railway
Virginia Central Railway
Visalia Electric Railroad Company

Walla Walla Valley Railway Company
Warren & Saline River Railroad Company
Warrenton Rail Road Company
Warwick Railway Company
Washington, Idaho & Montana Railway
Washington Terminal Company (The)
Waynesburg and Washington Railroad Company
Weatherford, Mineral Wells and Northwestern Railway Company (The)

Appendix A to Railroads' Motion to Intervene.

Wellsville, Addison & Galeton Railroad Corporation
Western Maryland Railway Company
Western Pacific Railroad Company (The)
Western Railway of Alabama (The)
West Pittston-Exeter Railroad Company
West Virginia Northern Railroad Company
Wharton and Northern Railroad Company
Wilkes-Barre Connecting Railroad
Winchester and Western Railroad Company
Winfield Railroad Company (The)
Winifrede Railroad Company
Winston-Salem Southbound Railway Company
Wrightsville and Tennille Railroad Company
Wyandotte Southern Railroad Company
Wyandotte Terminal Railroad Company

Yakima Valley Transportation Company
Yancey Railroad Company
Youngstown and Northern Railroad Company (The)
Youngstown & Southern Railway Company
Yreka Western Railroad Company

Railroads' Memorandum in Support of Motion to Intervene

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATEMENT

This is an action to enjoin, annul or set aside the Order of the Interstate Commerce Commission dated January 23, 1969 with respect to Master Tariff X 259 containing rate increases.

ARGUMENT

Title 28 §2323, United States Code provides in relevant part as follows:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party."

As appears from the Motion and Affidavit herein, the proposed intervenors were parties in interest to the proceeding for the Interstate Commerce Commission which resulted in the Orders involved in this case.

Rule 24 of the Federal Rules of Civil Procedure provides in relevant part as follows:

> "(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene;***"

Accordingly the proposed intervenors have an absolute right to intervene as parties in this action and respectfully request the granting of their motions for such intervention.

Respectfully submitted,

JEROME H. SHAPIRO
Attorney for Intervenors

Proposed Answer of Aberdeen and Rockfish Railroad Company, et al. Intervenors as Defendants

In The

United States District Court

For the Southern District of New York

[Title Omitted in Printing]

Aberdeen and Rockfish Railroad Company, et al, intervenors as defendants, in answer to the above complaint:

I

Admit the allegations of Paragraph 1.

II

Admit the allegation of Paragraph 2 that jurisdiction of the District Courts in suits to set aside some orders of the Interstate Commerce Commission is conferred by Sections 1336, 1398, 2284 and 2231-2325 of Title 28 of the United States Code and Section 703 of Title 5 of the United States Code, but deny the allegation of Paragraph 2 that the court has jurisdiction over the permissive orders entered November 25, 1968, 332 ICC 590, and January 9, 1969, 332 ICC 714, in the proceeding entitled *Ex Parte No. 259, Increased Freight Rates, 1968.*

III

Admit the allegations of Paragraphs 3 and 4.

IV

Admit the allegations in the first sentence in Paragraph 5, but deny all other allegations of Paragraph 5.

V

Admit the allegation of Paragraph 6 that the Interstate Commerce Commission entered orders in the *Ex Parte No. 259, Increased Freight Rates, 1968* proceeding on March 8, 1968; June 19, 1968; November 25, 1968 and January 9, 1969, but deny that those were the only orders entered in *Ex Parte No. 259* and deny all other allegations of Paragraph 6 and refer the court to the Commission's orders for a complete and accurate statement of their contents and to the record before the Commission for a complete and accurate description of the procedures in that case.

VI

Deny the allegation of Paragraph 7 that all administrative remedies of plaintiffs have been exhausted, the plaintiffs having failed to exercise their rights under the remedies described by the Commission in its January 9 report and order, which remedies are set forth in Sections 13 and 15 of Title 49 of the United States Code.

VII

Deny the allegations of Paragraphs 8 and 9.

VIII

Admit that the Interstate Commerce Commission was not a party to the proceeding before it in *Ex Parte No. 259*, but deny that there was any legal requirement for the Commission to become a party thereto, and deny each and every other allegation of Paragraph 10.

IX

Admit that no Recommended Report of the presiding hearing examiners was served on the parties, but deny that there is any legal requirement that such a recommended report be issued and deny that the Interstate Commerce Commission failed to state on the record that a recommended report would be omitted because due and timely execution of the Commission's function required an expedited decision, and deny each and every other allegation of Paragraph 11.

X

Admit that the Interstate Commerce Commission permitted the railroads to put into effect increases in varying amounts upon different commodities, but deny each and every other allegation of Paragraph 12.

XI

Deny the allegations of Paragraphs 13 and 14.

XII

Except as expressly admitted herein, deny each and every allegation in the complaint and deny that the actions of the Interstate Commerce Commission are unlawful in any respect.

WHEREFORE railroad intervenors as defendants pray that the complaint be dismissed with cost to the plaintiffs and pray that the relief sought be denied.

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Motion for Leave to Intervene by State of New York, and Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts

In The

United States District Court

For the Southern District of New York

[Title Omitted in Printing]

To the Honorable the Judges of the United States District Court for the Southern District of New York:

I.

The State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts (hereinafter the "Departments of Agriculture of the Northeastern States"), under Rule 24 of the Rules of Civil Procedure, hereby move the Court for an order permitting them to intervene as plaintiffs in this action, so that they may make and establish the claims set forth in the proposed complaint pleading attached hereto.

II.

The State of New York and the Departments of Agriculture of the Northeastern States were parties in interest in the proceedings before the Interstate Commerce Commission, Ex Parte 259, *Increased Freight Rates, 1968*, out of which this court action arose, and under the Judicial Code, 28 U.S.C. Section 2323, they may intervene herein as a matter of right, by orderly and appropriate procedure, and be represented by counsel in this proceeding. The

pertinent portion of the Judicial Code is quoted below for convenience:

> "The Attorney General shall represent the Government in the actions specified in Section 2321 of this title and in actions under Sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. As amended, May 24, 1949, c. 139, Section 116, 63 Stat. 105.
>
> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.
>
> "Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid Sections may intervene in said action at any time after commencement thereof.
>
> "The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein."

III.

WHEREFORE, the State of New York, and the Departments of Agriculture of the Northeastern States named above pray that an order be entered permitting them to intervene in this action and to file the proposed complaint pleading attached hereto.

Respectfully submitted,

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Intervenors' Proposed Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

The State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland, and Massachusetts for their complaint herein allege:

1. Plaintiffs bring this action to enjoin, annul and set aside the order of the Interstate Commerce Commission (hereinafter "the Commission") of January 23, 1969 (attached hereto as Appendix A) which order incorporates and makes a part thereof the interim order of the Commission issued November 26, 1968, and the order of the Commission denying reconsideration thereof dated March 26, 1969, and served April 1, 1969 (attached hereto as Appendix B), in a proceeding before the Commission entitled Ex Parte 259, *Increased Freight Rates, 1968*. Each of the plaintiffs was a party to the proceedings before the Commission which resulted in said orders and out of which the present action arises.

2. The jurisdiction of this Court is founded upon 5 U.S.C. Section 703 and 28 U.S.C. Sections 1336, 1398, 2284 and 2321-2325. The United States of America is named a statutory defendant pursuant to 28 U.S.C. Section 2322.

3. Plaintiffs herein are the following:

a. The Department of Agriculture of the State of Connecticut is a governmental department of that State

with principal offices at the State Office Building, Hartford, Connecticut 06115.

b. The Board of Agriculture of the State of Delaware is a governmental department of that State with principal offices at Drawer D, Dover, Delaware 19901.

c. The Department of Agriculture of the State of Maine is a governmental department of that State with principal offices at the State House, Augusta, Maine 04330.

d. The Maryland State Board of Agriculture is a governmental department of that State with offices at Symons Hall, University of Maryland, College Park, Maryland 20742.

e. The Department of Agriculture of the Commonwealth of Massachusetts is a governmental department of that Commonwealth with principal offices at 100 Cambridge Street, Boston, Massachusetts 02202.

f. The Department of Agriculture of the State of New Hampshire is a governmental department of that State with principal offices at the State House Annex, Concord, New Hampshire 03301.

g. The Department of Agriculture of the State of New Jersey is a governmental department of that State with principal offices at Box 1888, Trenton, New Jersey 08625.

h. The State of New York is represented through its Attorney General who has offices at the Capitol, Albany, N. Y. 12224 and 80 Centre Street, New York, N. Y. 10007.

i. The Department of Agriculture of the Commonwealth of Pennsylvania is a governmental department of that Commonwealth with principal offices at 2301 North Cameron Street, Harrisburg, Pennsylvania 17120.

j. The Director of Natural Resources of the State of Rhode Island is a governmental department of that State with offices at Veterans Memorial Building, 83 Park Street, Providence, Rhode Island 02904.

k. The Department of Agriculture of the State of Vermont is a governmental department of that State with principal offices at Montpelier, Vermont 05602.

l. The Department of Agriculture and Commerce of the Commonwealth of Virginia is a governmental department of that Commonwealth with principal offices at 203 North Governor Street, Richmond, Virginia 23219.

4. The plaintiffs are a State, or the departments of State governments, responsible for protecting and promoting the agriculture of their respective States. The agricultural economies of the Northeastern States are heavily dependent upon the inbound movement by rail of grain, feed and feed ingredients from other States. The increase in the rail freight rates on these commodities resulted in an additional burden on Northeastern agriculture of more than $2.4 million annually, according to the record before the Commission.

5. The Interstate Commerce Commission is an administrative tribunal, created by the Act to Regulate Commerce, approved February 4, 1887, 24 Stat. 383, and amendments thereto, with specifically vested duties and responsibilities to apply and enforce the statutory standards of the Interstate Commerce Act and the various acts amendatory thereof and supplemental thereto, including specifically the policy set forth in the Hoch-Smith Resolution, 49 U.S.C. Section 55, 43 Stat. 801.

6. The report and orders herein complained of, and which plaintiffs seek to have enjoined, annulled, and set

aside, permitted the railroads to put into effect proposed rail freight rate increases ranging from 3% to 10%, the increases authorized varying by region and/or commodity, with an increase of 6% specifically authorized on grain, feed, and feed ingredients moving into the Northeastern States.

7. The proceedings before the Commission leading to the orders complained of consist of an investigation conducted under special rules of procedure set forth in a Commission order entered July 3, 1968. Separate hearings were held on the issues of the railroads' cost and revenue need (Sub-No. 2) and the lawfulness of rate increases on ten groups of individual commodities (Sub-Nos. 3-11). The railroads' cost and revenue needs, on the one hand, and the increases in rate on individual commodities, on the other hand, were treated as separate and distinct issues, under the hearing procedures followed by the Commission. In its report and order served January 23, 1969, the Commission found that the railroads had established a need for increased revenues but refused to rule on the lawfulness of the contribution to such revenues required of any given commodity or region by explicitly rejecting evidence of the present costs borne by such traffic. The Commission further refused to require justification for differing increases as to different commodities or regions. The Commission ruled that such authorization did not "preclude interested parties from bringing any maladjustments to our attention for correction." 332 I.C.C. 792. In an order served April 1, 1969, the Commission denied the Petitions for Reconsideration of New York and the Northeastern States on the sole grounds that "sufficient grounds have not been presented to warrant granting the action sought."

8. The order of the Commission dated March 26, and served April 1, 1969, denying reconsideration sought by plaintiffs was a final administrative decision in that proceeding, plaintiffs thereby having exhausted their administrative remedies with respect to the Commission's action in authorizing said rate increase.

9. Plaintiffs have standing to bring this action as parties aggrieved under 5 U.S.C. Section 702 in that the Commission's authorization of rate increases in and of itself inflicts legal wrong upon the interests represented by plaintiffs.

10. The Commission, in the orders under review, erred in the following respects:

(a) The Commission erred as a matter of law in permitting increases of varying amounts on different commodities and in different regions while rejecting, and ruling irrelevant, evidence that traffic subjected to higher percentage increases was presently bearing a disproportionate contribution to rail revenues; such error was, in addition, arbitrary, capricious, an abuse of discretion, and deprived plaintiffs of due process and a fair hearing;

(b) The Commission acted arbitrarily, capriciously and abused its discretion in refusing to give any consideration whatsoever to plantiffs' cost study on the grounds that consideration of such studies would make impossible the effective prosecution of its regulatory function, where plaintiffs presented a comprehensive cost study for the traffic involved, such study was received into evidence, the railroads declined to cross-examine thereon, and in fact submitted evidence verifying the accuracy of such study;

(c) The Commission, acted arbitrarily and capriciously in finding that specific increases on grain to the Southeast,

an area in intense competition with the Northeast, approximated 5 to 6.3% and were thus comparable to the 6% increase in the rates to the Northeast; such finding was contradicted by the evidence of record and the Commission's own findings (332 I.C.C. 749, footnote 3); the Commission's refusal to correct such fundamental error on reconsideration was arbitrary, capricious, and an abuse of discretion;

(d) The Commission's refusal to conclude that the respective increases authorized were unduly prejudicial of the Northeast and unduly preferential of the Southeast was based on a fundamental misconception of the percentage increases authorized to the Southeast; the Commission's refusal to so conclude was, therefore, arbitrary, capricious, an abuse of discretion, and a denial of plaintiffs' right to due process and a fair hearing;

(e) The Commission erred as a matter of law, and acted arbitrarily and capriciously, in finding that prior reductions in rates, based on heavier loading and reduced service, justified the rate increase at issue;

(f) The Commission erred as a matter of law in totally refusing to consider, or apply, the policy, and statutory standards reflected therein, set forth in the Hoch-Smith Resolution, 49 U.S.C. Section 55;

(g) The Commission acted contrary to statutory requirements, arbitrarily and capriciously, and abused its discretion in refusing to consider or to give any weight to, economic conditions and trends in Northeastern agriculture and, in particular, the impact of declining prices, in determining the effect of the protested rate increase on the movement of traffic, on the free movement of commodities,

on the natural and proper development of the country as a whole, and on the ability of Northeastern agriculture to bear such rate increase, thereby violating Section 15a(2) of the Interstate Commerce Act;

(h) Specifically, the Commission acted arbitrarily, capriciously, abused its discretion, and denied plaintiffs due process and a fair hearing by refusing to consider the inability of Northeastern agriculture to pass on freight rate increases to the consumer, in determining the effect of the freight rate increase on the movement of traffic;

(i) The Commission denied plaintiffs due process and a fair hearing by refusing to make requested findings and conclusions regarding economic conditions in Northeastern agriculture, and to base its decision thereon, while according such consideration to other industries;

(j) The Commission's conclusion that the increased freight rates authorized will have no undue adverse effect on the movement of the traffic involved is not supported by necessary subsidiary findings or by substantial evidence, and is in fact contrary to the evidence of record;

(k) The Commission erred as a matter of law in authorizing selective, varying percentage rate increases on various commodities and in various regions without applying mandatory statutory standards of reasonableness and preference and prejudice to such individual increases.

WHEREFORE plaintiffs pray

(1) That a three-judge court be convened pursuant to the provisions of Section 2284(1) of Title 28 of the United States Code.

(2) That after hearing before such court judgment be entered permanently enjoining, annulling and setting aside the complained of Commission order.

(3) That plaintiffs be granted such other and further relief as the Court deems appropriate in the circumstances.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General

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State of New York's Proposed Complaint

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For the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland, Massachusetts and Virginia

Answer of the Interstate Commerce Commission

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

FIRST DEFENSE

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the Interstate Commerce Commission, a defendant herein, avers that the complaint fails to state a claim upon which relief can be granted because the orders of the Commission here under attack are not reviewable for the following reasons:

1. The said orders of the Commission are permissive in nature and do not approve the justness or reasonableness of any particular rate.

2. The plaintiffs have failed to exhaust their administrative remedies under 49 U.S.C. 13 and 15 by attacking the justness and reasonableness of the rates applicable to the commmodities shipped or received by them.

3. The plaintiffs lack standing to maintain this action since they have suffered no independent legal wrong by reason of the orders of the Commission here under attack.

SECOND DEFENSE

Without waiving their First Defense, defendant answers the allegations of the complaint on the merits as follows:

I.

Admits the allegations of Paragraph 1.

II.

With respect to the allegations of Paragraph 2, admits that the United States is a statutory defendant under 28 U.S.C. 2322 and that section 703 of Title 5 and sections 1336, 1398, 2284, and 2321-2325 of Title 28 of the United States Code allow judicial review of certain orders of the Commission but denies that these sections apply to the permissive orders here challenged.

III.

Admits the allegations of Paragraph 3.

IV.

With respect to the allegations of Paragraph 4, admits that plaintiffs are public utilities incorporated and residing in various states as alleged but denies the remaining allegations because it lacks knowledge or information sufficient to form a belief as to the truth thereof.

V.

With respect to the allegations of Paragraph 5, admits that plaintiffs engage in the business of generating and supplying electricity as regulated public utilities but denies the remaining allegations.

VI.

With respect to the allegations of Paragraph 6, admits that the Commission entered, among others, the orders referred to but respectfully refers the Court to those orders and the record in the proceedings for a complete and accurate description of their contents, the Commission's actions and the procedures followed; otherwise, denies the remaining allegations of Paragraph 6.

VII.

Denies the allegations of Paragraphs 7, 8, 9, 10, 11, 12, 13 and 14, inclusive.

VIII.

In further answer to the allegations of the complaint, denies that the actions of the Commission here challenged are unlawful or improper for the reasons alleged or for any other reason and avers that the Commission acted lawfully in all respects.

WHEREFORE, defendant prays that the complaint be dismissed and all relief sought be denied.

ROBERT W. GINNANE
General Counsel

ARTHUR J. CERRA
Associate General Counsel
PHILIP W. GETTS
Attorney
Interstate Commerce Commission
Washington, D. C. 20423
Attorneys for the Interstate
Commerce Commission

Answer of the United States of America

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

The United States of America, a defendant in the above action, in answer to the complaint and intervening complaint neither admits nor denies the allegations thereof. The United States of America neither supports nor opposes the order of the Commission.

RICHARD W. MCLAREN
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JOHN H. D. WIGGER
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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

The State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland, and Massachusetts, having moved for leave to intervene as party plaintiffs in this action and their right thereto appearing and there being no opposition thereto, it is

ORDERED that said motion to intervene herein be and the same hereby is granted and the State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts shall appear herein as party plaintiffs and may assert the allegations in the complaint annexed to said intervenors' motion for leave to intervene.

Dated: New York, New York
May 8, 1969

CHARLES M. METZNER
U. S. D. J.

Order

In The

United States District Court

For the Southern District of New York

[Title Omitted in Printing]

This matter having come on upon the motion of the Aberdeen and Rockfish Railroad Company, et al., to intervene as defendants in this proceeding and the Court having considered the motion and being fully advised in the premises, it is hereby:

Ordered that the Aberdeen and Rockfish Railroad Company and the railroads and carriers listed in Appendix A of the motion, be permitted to intervene as defendants and be permitted to file their answer.

Charles M. Metzner
United States District Court Judge

Dated: May 8, 1969

Motion for Appointment of Statutory Three-Judge Court and for Prehearing Conference

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs, upon their complaint previously filed, hereby make application for hearing of this cause which seeks a permanent injunction restraining the enforcement, operation or execution of an order of the Interstate Commerce Commission, which order was issued by that Commission on January 23, 1969, before a three-judge District Court, as required by 28 U.S.C. §2325 and requests that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified pursuant to 28 U.S.C. §2284, of presentation of plaintiffs' application for injunction in order that necessary designation of judges for said court may be made.

Defendant Interstate Commerce Commission in its answer to Plaintiffs' complaint pleads as a defense failure of Plaintiffs to state a claim upon which relief can be granted. Plaintiffs therefore petition for the setting of a date for a prehearing conference before one or more judges of the three-judge panel, in order to promptly arrange for the best procedure to be followed herein to determine whether Plaintiffs have a claim upon which relief can be granted.

WHEREFORE, Plaintiffs hereby move this Court for an order appointing a statutory three-judge court, and for the setting of a date for a prehearing conference.

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Statement of Position of the Interstate Commerce Commission on Pending Motion of Plaintiffs, et al.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

The motion of plaintiffs and intervening plaintiffs requests the convening of a statutory three-judge court pursuant to 28 U.S.C. 2284 and the setting of a date for a prehearing conference before one or more judges of the three-judge court, in order to promptly arrange for the best procedure to determine the Interstate Commerce Commission's affirmative defense as to whether plaintiffs have a claim upon which relief can be granted.

The Commission states its position as follows:

(1) Insofar as the Motion requests the appointment of a statutory three-judge court pursuant to 28 U.S.C. 2284, it should be granted.

(2) The Motion's remaining relief which requests the setting of a date for a prehearing conference before one or more members of the yet to be appointed three-judge court is premature and should be denied for the following reasons:

(a) The time for answering the intervening complaint by the Commission and the intervening defendant railroads has not expired and will not expire until July 1, 1969. That time is required to study the individually different situation presented. Additionally, that time is required to permit counsel for the Commission to prepare

a brief on the merits in an action in the United States District Court for the District of Columbia[1] attacking the same orders of the Commission in their entirety.[2]

(b) The three-judge court to be appointed is the appropriate panel to address any request for a prehearing conference to establish procedures for disposing of the case. Such action requires consideration of the individual docket commitments of each panel member. Moreover, piecemeal consideration of an affirmative defense without reference to the merits of the case could conceivably result in the requirement that the appointed three-judge panel convene twice to hear argument in the case. In view of the crowded docket of this District Court and the Second Circuit Court of Appeals, it would seem more appropriate for the appointed three-judge panel to decide as to the proper procedure for disposition of the instant judicial review action. In our view it is more conducive to orderly judicial procedure and convenient to the members of the panel and the litigants to brief and argue all issues in the case at one time and thus avoid any possible interlocutory appeals to Supreme Court and rehearings.

Accordingly, the Commission consents to the granting of the Motion insofar as it requests the appointment of a

1. *Alabama Power Company, et al.* v. *United States, et al.*, Civil Action No. 2970-68.

2. Contrast the allegations there with the limited basis of attack alleged in the complaint and intervening complaint herein.

statutory three-judge court and respectfully prays that the other relief be denied.

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ARTHUR J. CERRA
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Designation of Judges

In The

United States District Court

For the Southern District of New York

[Title Omitted in Printing]

Having been notified by the Honorable Edward C. McLean, United States District Judge for the Southern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2325 for a judicial review of certain actions, findings, conclusions and orders of the Interstate Commerce Commission, pursuant to Title 28 United States Code Section 2284, I hereby designate the following judges, in addition to the Honorable Edward C. McLean, to hear and determine said cause as provided by law: Honorable Irving R. Kaufman, United States Circuit Judge, and Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York.

It Is Hereby Ordered that this order be filed in the above entitled cause in the said District Court.

J. Edward Lumbard
Chief Judge, United States Court
of Appeals for the Second Circuit

Dated: New York, N. Y.
June 4, 1969.

Answer of the Interstate Commerce Commission to the Intervening Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

FIRST DEFENSE

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the Interstate Commerce Commission, a defendant herein, avers that the intervening complaint fails to state a claim upon which relief can be granted because the orders of the Commission here under attack are not reviewable for the following reasons:

1. The said orders of the Commission are permissive in nature and do not approve the justness or reasonableness of any particular rate.

2. The plaintiffs have failed to exhaust their administrative remedies under 49 U.S.C. §§13 and 15 by attacking the justness and reasonableness of the rates applicable to the commodities shipped or received by them.

3. The plaintiffs lack standing to maintain this action since they have suffered no independent legal wrong by reason of the orders of the Commission here under attack.

SECOND DEFENSE

Without waiving its First Defense, defendant answers the allegations of the intervening complaint as follows:

Answer of the Interstate Commerce Commission to the Intervening Complaint

I.

Admits the allegations of Paragraph 1, but respectfully refers the Court to all reports, orders, and other documents referred to therein for a complete and accurate description of their contents.

II.

With respect to the allegations of Paragraph 2, admits that the United States is a statutory defendant under 28 U.S.C. 2322 and that section 703 of Title 5 and sections 1336, 1398, 2284, and 2321-2325 of Title 28 of the United States Code allow judicial review of certain orders of the Commission but denies that these sections apply to the permissive orders here challenged.

III.

Admits the allegations of Paragraph 3 and sub-paragraphs thereof.

IV.

With respect to the allegations of Paragraph 4, admits that plaintiffs are States or the departments of States, but otherwise, defendant is without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 4.

V.

Admits the allegations of Paragraphs 5 and 6, but respectfully refers the Court to all statutes and orders referred to therein for a complete and accurate statement of their contents.

VI.

With respect to the allegations of Paragraph 7, admits that in the instant proceeding, Ex Parte No. 259, the Com-

mission conducted hearings, received and considered evidence, and issued orders, but respectfully refers the Court to the official record of that proceeding for a complete and accurate description of the Commission's actions therein; otherwise, denies the allegations of Paragraph 7.

VII.

Denies the allegations of Paragraphs 8 through 10 inclusive and sub-paragraphs thereof.

VIII.

In further answer to the intervening complaint, denies that the Commission has acted unlawfully in any manner, and avers that the orders here challenged are lawful and proper in all respects.

WHEREFORE, defendant prays that the intervening complaint be dismissed and all relief sought denied.

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ARTHUR J. CERRA
Associate General Counsel

PHILIP W. GETTS
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Motion of Defendant Interstate Commerce Commission to Dismiss

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Now comes defendant, the Interstate Commerce Commission, and respectfully moves the Court to dismiss this action on the grounds that plaintiffs and intervening plaintiffs have failed to state a claim against defendant upon which relief can be granted.

Respectfully submitted,

ROBERT W. GINNANE
General Counsel

ARTHUR J. CERRA
Associate General Counsel

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Interstate Commerce Commission
Washington, D. C. 20423

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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Memorandum of the Interstate Commerce Commission In Support of Its Motion to Dismiss

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Statement of the Case

This is an action to set aside and annul an order of the Interstate Commerce Commission entered January 9, 1969, in Docket No. Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 I.C.C. 714, the relevant particulars of which are discussed below.

In answer to the Complaint, the Commission asserted a First Defense, alleging that plaintiffs,[1] for various reasons, were not entitled to judicial review of the order assailed. Plaintiffs requested and were granted a pre-hearing conference to decide how best to dispose of this defense. At this conference, Judge McLean requested the Commission to file a motion to dismiss in order to facilitate a hearing limited to its First Defense.

In compliance with that request, the Commission has herewith filed a Motion to Dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, asserting that plaintiffs have failed to state a claim upon which relief can be granted.

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1. Unless otherwise noted, the word "plaintiffs" include intervening plaintiffs.

Statutes Involved

The statutes involved are Sections 13 and 15 of the Interstate Commerce Act. Section 13(1) (49 U.S.C. §13(1)) provides:

> That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(1) (49 U.S.C. §15(1)) provides:

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this part,

or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Question Presented by Defendant's Motion to Dismiss

Whether individual shippers attacking only two rates may seek judicial review of a Commission order which approved the general level of rates but which did not pass on the reasonableness of the particular rates attacked by plaintiffs.

ARGUMENT

Individual shippers may not seek review of Commission orders approving an increase in the general level of rates by alleging only that a particular rate included therein is unjust and unreasonable.

Plaintiffs, as individual shippers concerned only with specific commodities, have asked this Court to set aside a Commission order dealing with the over-all railroad freight rate structure on the grounds that two rates— small parts of that order—are unjust and unreasonable. Yet plaintiffs admittedly seek this relief without having followed the statutorily prescribed means of seeking review of the justness and reasonableness of these rates and without alleging that they have suffered any invasion of their rights aside from a duty to pay increased rates on grain and coal. As will be seen, such allegations do not state a claim upon which relief can be granted.

The statutory scheme of rate-making does not contemplate review of the general orders here challenged. *Algoma Coke & Coal Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va. 1935); *Koppers Co.* v. *United States*, 132 F.Supp. 159 (W.D. Pa. 1955); *Florida Citrus Commission* v. *United States*, 144 F.Supp. 517 (M.D. Fla. 1956), *aff'd mem.* 352 U.S. 1021 (1957). Rate-making is a complex task, and Congress has carefully allocated the burdens of this process among the

carrier, the agency, and the court. Initiation of rate changes is left solely to the carrier, and the Commission has the power only to approve or disapprove the carrier's proposals, although it may also prescribe maximum or minimum rates or rate levels if it finds the carriers' proposals to be unjust and unreasonable. Judicial review of a rate is proper only when (1) the Commission has issued a final order, after a hearing, finding a proposed rate to be just and reasonable, or (2) when a shipper has filed a complaint under sections 13 and 15 of the Interstate Commerce Commission Act (49 U.S.C. §§13 and 15) attacking the rate and the Commission has dismissed the complaint.[2] Absent these two conditions—neither of which are present here—Congress and the Courts have prohibited judicial review of Commission orders allowing rates to become effective. See, *e.g. Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); *Oscar Mayer & Co.* v. *United States*, 268 F.Supp. 977 (W.D.Wis. 1967); *Luckenbach S.S. Co.* v. *United States*, 179 F.Supp. 605 (D.Del. 1959), *dismissed as moot*, 364 U.S. 280 (1960). Plaintiffs admit that they have not filed complaints under sections 13 and 15 of the Act, but they nevertheless allege that they have exhausted their administrative remedies and that the order in question is reviewable. Plaintiffs' claims of reviewability ignore the true nature of the Commission's order and, in light of the undisputed facts, are not a legally sufficient predicate for judicial review.

In the instant case, the railroads determined that they required immediate increases in the general level of rates on virtually all commodities to meet rapidly rising operating costs. Rather than file a separate tariff proposing a new

2. Conversely, a carrier may seek review only when the Commission has specifically rejected a proposed rate in either of the two situations described.

rate on each commodity involved, the carriers sought and received on March 8, 1968, special permission to publish the increases in the general level of rates by means of a master tariff with connecting link supplements making the ordinary rate tariffs subject to the selective percentage increases specified in the master tariff.[3] The order here attacked merely approved use of this publication procedure as a means of expeditiously effecting the necessary increases,[4] which the Commission found "will not exceed a maximum reasonable level." The order specifically did not pass on the justness and reasonableness of individual rates but provided for correction of individual rate maladjustments through complaint and investigation as provided by 49 U.S.C. §§13 and 15 (See 332 I.C.C. at 608; 332 I.C.C. at 792.)

Courts have consistently held that there can be no judicial review of such an order. In *Algoma Coke & Coal Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va. 1934), coal shippers attacked a similar general increase order alleging only that the rates for coal were unjust and unreasonable; the court denied review on the grounds that an order in a general revenue case is permissive only and does not finally approve specific rates. 11 F.Supp. at 492-94. Similary, in *Koppers Co.* v. *United States*, 132 F.Supp. 159 (W.D. Pa. 1955), the court dismissed a complaint attack-

3. Similar procedures have frequently been employed when the railroads have sought general increases based on a showing of revenue need, see, *e.g.*, *Increased Freight Rates, 1951*, 284 I.C.C. 575, *Increased Freight Rates, 1960*, 311 I.C.C. 373, and the Supreme Court has approved the use of these general revenue procedures to grant general rate increases. See *Louisiana* v. *United States*, 290 U.S. 70, at 77 (1933); *New England Divisions Case*, 261 U.S. 184, 197-198 (1923).

4. Specifically, the orders vacated earlier suspension orders and permitted the carriers to depart from the long-and-short haul clause of Section 4 of the Interstate Commerce Act (49 U.S.C. §4) and from the tariff filing requirements of Section 6.

ing a specific rate included in a general increase order, observing that the Commission, by its order, "was not dealing finally with particular rates for particular traffic, but permitting increased rates for selected commodities, by a general order affecting all railroads in the country." 132 F.Supp. at 163. See also, *Florida Citrus Commission* v. *United States*, 144 F.Supp. 517 (M.D. Fla. 1956), *aff'd mem.* 352 U.S. 1021 (1957), where the court denied review of a general increase order attacked on the ground that particular rates were unjust and unreasonable.

As these cases uniformly recognize, plaintiffs' proper remedy is the filing of a complaint with the Commission pursuant to sections 13 and 15 of the Interstate Commerce Act (49 U.S.C. §§13 and 15) attacking the particular rates in question as unjust and unreasonable. The impropriety of allowing judicial review of this order in the absence of exhaustion of these statutory remedies is demonstrated by plaintiffs' prayers for relief, which seek reversal of the order approving the entire general increase because just two specific rates may be unjust and unreasonable. If the Court were to grant this relief, the railroads would be denied all the revenues to which the Commission concluded they were entitled—a conclusion plaintiffs do not challenge. As was said in *Koppers Co.* v. *United States, supra:*

> It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15

> has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits. [132 F.Supp. at 163].

Moreover, neither group of plaintiffs has alleged facts showing that any of their rights or interests will be unlawfully invaded by the order in question. Plaintiff electric companies allege only that they will be subjected to higher rates on coal and do not and cannot allege that these rates are unlawful; nor do they allege that they will be in any worse position than other similarly-situated shippers. See *Algoma Coke & Coal Co.* v. *United States*, 11 F.Supp. at 495. Intervening plaintiffs allege discrimination, but in the *Koppers* Case, such an allegation did not render the general increase orders reviewable in the absence of a final Commission order in a complaint proceeding. Intervening plaintiffs were not harmed simply because the Commission allowed inclusion of the differential grain rates in the general revenue increase. In such a massive proceeding, the Commission cannot be expected to examine the rate structures of particular commodities to uncover every potential instance of undue discrimination. 332 I.C.C. at 750; *Increased Freight Rates, 1967*, 332 I.C.C. 280, at 300 (1968); see also, *United States* v. *Louisiana*, *supra*, 270 U.S. at 77, where the Supreme Court recognized the impracticality of examining particular rates in a general revenue case.

The mere fact that a higher rate is instituted through the device of a general revenue case does not subject plaintiffs to legal injury. Here the railroads exercised their statutory right to initiate rate increases, *Algoma Coke & Coal Co.* v. *United States*, *supra*, 11 F.Supp. at 493, and the Commission merely agreed to vacate its suspension order if these rates were included in a general increase

based on revenue need. Moreover, the Commission specifically refrained from approving individual rates and emphatically stated that any particular rate would be subject to complaint proceedings under Sections 13 and 15. Thus, the order here challenged does not, by itself, injure plaintiffs or threaten them with an injury in any way entitling them to judicial review. *Algoma Coke & Coal Co. v. United States, supra,* 11 F.Supp. at 495-96; *Koppers Co. v. United States, supra,* 132 F.Supp. at 162-63. See generally, Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, at 371 (1968).

Plaintiffs have thus failed to allege adequate grounds for invoking judicial review of the Commission's order. The Commission was within well-recognized bounds of discretion in approving the general increase procedure requested by the railroads, and it did not approve the specific rates assailed by plaintiffs. Plaintiffs admittedly have not pursued their statutory remedy before the Commission, and an allegation that one rate may be unjust and unreasonable does not render reviewable an order concerning the general rate structure.

Conclusion

For the foregoing reasons, plaintiffs' complaints should be dismissed for failure to state a claim upon which relief may be granted.

Respectfully submitted,

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Memorandum of Aberdeen and Rockfish Railroad Company, et al., Intervening as Defendants, In Support of Defendant Interstate Commerce Commission's Motion to Dismiss.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

In this case the railroads which were before the Interstate Commerce Commission in its *Ex Parte 259* proceeding have intervened in support of that Commission and of its orders of November 25, 1968 and January 9, 1969 in the *Ex Parte 259* case.

In answer to the complaint by which plaintiffs and intervening plaintiffs seek to set aside those orders the Interstate Commerce Commission affirmatively asserted the defense that the complaint does not state a cause of action. The railroad intervenors as defendants raised the same defense by denial of allegations in the complaint. The court has expressed a desire to determine the merits of that defense.

The Interstate Commerce Commission is filing its motion to dismiss for failure to state a cause of action and is also filing its statement of material facts pursuant to Rule 9(g) of this Court's general rules. The railroad intervenors as defendants adopt the statement of material facts filed by the Commission and submit this memorandum in support of the motion to dismiss.

Railroads' Memorandum in Support of Motion to Dismiss

I.

The Ex Parte No. 259 Case.

As stated in the reports of the Interstate Commerce Commission in *Ex Parte 259, Increased Freight Rates, 1968*, 332 ICC 590, 332 ICC 714 (attached to intervenors' complaint as Appendices A and B), the increased rates proposed by the railroads in the tariffs filed by them are necessary because:

> "There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges, subject to the limitations and exceptions set forth below, are permitted to be continued or to be put into effect." (332 ICC at P. 790)

The railroads had not increased their rates during the years 1960 to 1967. See *Ex Parte 256, Increased Freight Rates, 1967*, 329 ICC 854, 865. In fact, contrary to the general trend of the economy, the railroads had reduced their rates during that period. (See the table in Appendix A to intervenors' complaint, 332 ICC at P. 603)

However, beginning early in 1967 the patterns of wage settlements and material prices were such that the railroads were forced to increase their rates. In its report the Commission found that the increased costs of the railroads on an annual basis over the 1966 cost level were approximately

$855.4 million (332 ICC at P. 599-600) and further found that:

> "The *Ex Parte No. 256* rate increases, at the constructive year traffic level, should be generating approximately $300 million in increased freight revenue, which leaves $555.4 million in increased expenses to be met by the *Ex Parte No. 259* increases in rates and charges. Respondents estimate that . . . if all of their proposed increases become effective, they will produce . . . an aggregate of $466.2 million . . . Approval of the entire rate adjustment would thus leave respondents short by at least $89.2 million of annual revenue needed simply to cover their increased expenses." (332 ICC at P. 602)

The Commission was concerned regarding these large increases in costs because the railroads' rates of return on net investment in recent years have been, in the words of the Commission, "clearly inadequate." Those inadequate rates of return were: (332 ICC at P. 603)

	1966	1967	1968[1]	Constructive Year[1]
Eastern District	3.53	1.58	1.77	2.37
Southern District	4.55	3.86	3.65	4.36
Western District	4.03	2.75	2.93	3.35
United States	3.90	2.45	2.58	3.12

1. Rate of return for 1968 and for the constructive year estimated. The constructive year estimates are based on estimated 1968 traffic levels at the cost level for the last 6 months of 1968 and at the rate level including the *Ex Parte 259* tariff increases.

Even counsel for complainants here, in representing those clients before the Commission in the *Ex Parte 259* case,

seemed to share the Commission's concern about the low rate of return. He stated:

> "There is no denying that certain railroads are in dire straits . . ." (Tr. 180)

and

> " . . . admittedly, a four percent rate of return would be inadequate by today's standards . . ." (Tr. 183)

Neither the complaint nor the intervening complaint herein alleges any error on the part of the Commission in finding that the railroads had an urgent need for additional revenue; that their rates of return are "clearly inadequate"; and that the increased rates initiated by the railroads would fall short of covering their increased costs.

II.

Relief Sought by Plaintiffs and Intervening Plaintiffs.

Plaintiffs and intervening plaintiffs allege that by the *Ex Parte 259* tariff the railroads put into effect freight rate increases which range from 3% to 10% on virtually all commodities shipped within the United States, including an increase of 5%, maximum 15 cents per ton, on bituminous steam coal and an increase of 6% on grain, feed and feed ingredients moving into Northeastern States. (Compl. Par. 6, Intervening Compl. Par. 6)

Representing themselves to be interested in the rates on bituminous steam coal to certain electric utility power stations to which their freight charges were allegedly increased $2.7 million annually, the seven utility plaintiffs seek to enjoin the orders of January 9, 1969 and November

25, 1968. (Compl. Par. 1 and Prayer) As plaintiffs seem to construe the order, the injunction would deny the United States railroads urgently needed annual revenues of approximately $466.2 million which the Commission found the *Ex Parte 259* tariff increases would produce. (332 ICC at P. 602) Similarly, intervening complainants seek to enjoin the orders of January 9, 1969 and November 25, 1968 in their entirety. (Intervenors' Compl. Par. 4 and Prayer)

III.

The Complaint should be dismissed.

A. Under the Interstate Commerce Act Railroads Have the Right to Initiate Rate Changes.

The Interstate Commerce Act, 49 USC §1 *et seq.*, sets forth a comprehensive, regulatory scheme containing standards of lawfulness to which freight rates must conform and empowers the Interstate Commerce Commission to secure compliance with those standards. However, under the statutory plan the railroads may initiate and publish freight tariffs containing new or changed rates. As noted by the Supreme Court:

> "A carrier is entitled to initiate rates, and in this connection, to adopt such policy of rate making as to it seems wise . . ." *United States* v. *Illinois Central R.R.*, 263 U. S. 515, 522 (1923).

Of course, rail rates must be filed with the ICC pursuant to Section 6 of the Interstate Commerce Act. (49 USC §6) During the fiscal year ended June 30, 1968, the railroads filed 75,128 freight rate tariffs with the Commission.[2] During that year the Commission was petitioned to suspend 401

2. 82nd Annual Report of ICC, P. 34.

rail rate adjustments. However, in the exercise of its discretion under Section 15(7) of the Interstate Commerce Act [49 USC §15(7)], the Commission suspended only 110 rail rate adjustments in full or in part.[3] This indicates that the railroads' rate structure is largely initiated by the railroads. Even the Commission's power to interfere with the railroad publication of rate changes is limited and the court may not enlarge or interfere with the Commission's exercise of its discretionary powers under Section 15(7) of the Act. See *Arrow Transp. Co. v. United States*, 372 U. S. 658 (1963).

B. Procedures before the Interstate Commerce Commission.

The Commission's *Ex Parte 259*[4] proceeding began on March 7, 1968, when the Class I railroads of the United States[4] petitioned the Commission for relief from the Commission's own regulations as to the form in which tariffs must be published.[5] These regulations are not statutory, although the Commission's authority to issue such tariff rules and regulations is found in Section 6 of the Interstate Commerce Act (49 U.S.C. §6). That section provides that the Commission may in its discretion allow the filing of tariffs that depart from the form required by Commission regulations. [Section 6(3)]

By order entered March 8, 1968 the Commission granted the ministerial relief requested by the railroads, which

3. Ibid. 29.

4. Also some railroads of other classes and some water and motor carriers that maintain joint rates with the railroads.

5. The petition also requested modification of outstanding orders of the Commission and new and modified fourth section relief (49 U.S.C. §4), but these were merely ancillary to the publication of the rates.

relief merely allowed the railroads to file the tariffs to become effective 75 days after filing. However, the tariffs remained subject to suspension and investigation by the Commission. The tariff was filed to become effective May 24, 1968. The railroads, in cooperation with the Commission, voluntarily postponed the effective date to June 19, 1968.

On March 12, 1968 the Commission issued an order setting special rules of procedure. The order authorized the filing of verified statements in support of and in opposition to the petition and the filing of reply verified statements, to be followed by briefs and oral argument on the question of whether the *Ex Parte 259* tariff should be suspended, investigated, or allowed to go into effect without suspension or investigation.

Following oral argument on June 13-14, 1968, the Commission elected to suspend the effectiveness of the *Ex Parte 259* tariff for the statutory seven-month period allowed under Section 15(7) of the Act. Its order of June 19, 1968 suspended the tariff until January 23, 1969 and instituted an investigation. The suspension order was without prejudice to the publication in another tariff of increases which did not exceed 3%.

On July 3, 1968 the Commission entered a special procedural order assigning the case for hearing in ten sub-numbered parts before four hearing examiners. Sub No. 2 involved Railroad Cost and Revenue Need and Sub Nos. 3-11 involved one or more commodities or commodity groups. Extensive hearings were had in which the Commission was called upon to consider a mass of evidence and many contentions.[6] The Supreme Court recognizes the

6. Hundreds of parties participated in the Commission proceeding. The direct testimony of all parties was presented in 496 verified statements containing thousands of pages of testimony and statistics in addition to 4349 pages of transcript taken at the hearings.

practicalities of the ICC's regulatory problem in revenue cases such as this. See *United States* v. *Louisiana*, 290 U.S. 70, 77 (1933), where the court said:

> "* * * in performing the duty broadly to increase carrier revenue, it is enough if the Commission in the first instance, makes such inquiry and investigation as would enable it to say that the prescribed increases when applied to members of the group will generally not exceed a reasonable maximum. The extent of this inquiry and the detail of investigation cannot be marked by this court with certainty."

See also *New England Divisions Case*, 261 U.S. 184, 197-198 (1923), where the court said:

> "For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure.[17] This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, §12, 36 Stat. 539, 551, 552, to be upon the carrier.[18] Thus, the practice did not have its origin in the group system of rate-making provided for in 1920 by the new §15a. It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases * * *" (261 U.S. at Pp. 197-198) [footnotes omitted]

The Commission received briefs from all parties on or before November 12, 1968 and on November 25, 1968 entered its interim order in which it vacated the suspension order of June 19, 1969 (with exceptions on a few commodities not involved here). The final order entered January 9, 1969 and printed at 332 ICC 714 ordered the railroads to cease and desist from making effective a few of the increases that were published in the *Ex Parte 259* tariff, and except for those few changes, which are not involved here, vacated the suspension orders.

The Commission also modified outstanding orders in other cases which might prohibit the increases contained in the *Ex Parte 269* tariff and issued relief from the provisions of Section 4 of the Act. However, those actions were merely incidental to the tariff publication. Plaintiffs and intervening plaintiffs have never addressed themselves to any issues under Section 4, nor have they claimed that they were affected by any outstanding orders.

In short, the increased rate tariff was initiated by the railroads; it was suspended by the Commission; the suspension was vacated and the tariff became effective by its own terms. They are railroad-initiated rates. The Commission specifically stated that the rates are not Commission prescribed or established. The Commission found:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the

> decision in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects be subject to complaint and investigation as provided by the act." (332 ICC at P. 792)

The permissive nature of the Commission's action in vacating suspension of the *Ex Parte 259* tariff is stated in its report as follows:

> "Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed * * *" (332 ICC at P. 715)

C. Precedent Requires Dismissal

This case is controlled by the precedent in *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935).

In that case a three-judge District Court was requested to enjoin and set aside orders of the Interstate Commerce Commission entered in a general revenue increase proceeding—*Ex Parte 115, Emergency Freight Charges, 1935*, 208 ICC 4. In that case, the Commission, as here, approved increases in rates on a selective basis "to meet in part increased expenses of operation caused by an increased wage scale and rising costs of materials and supplies." (11 F. Supp. 489)

In approving the increases, the Commission made the following findings and issued the following orders—all of

which are couched in language similar to like findings and orders in *Ex Parte 259*:

> " . . . we find that the present rates and charges, as increased by the emergency charges here authorized, will not be in excess of just and reasonable rates for a period to terminate June 30, 1936." (208 ICC at P. 60)
>
> "It should be clearly understood that the plan of emergency charges here provided is permissive in character." (208 ICC at P. 59)
>
> " . . . the resulting rates will in all respects be subject to complaint or to investigation and to determination as to the lawfulness of schedules or rates, as provided by the act. In applicants' closing brief, they concede in effect that the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, will have no application to increases in rates such as those which we authorize." (208 ICC at P. 60)
>
> "As in *Ex Parte No. 103*, we shall grant the necessary authority under Section 6 for filing blanket supplements, embodying the emergency charges here provided for . . ." (208 ICC at P. 60)
>
> " . . . we shall enter an order authorizing departures from section 4 in order to permit the emergency charges here approved to be established." (208 ICC at P. 61)

Following the issuance of the Commission's order in *Ex Parte 115*, a group of 179 plaintiffs representing coal interests filed suit to suspend, annul, and set aside those orders. In a well reasoned opinion the court dismissed the complaint.

The court first took note of the permissive nature of the relief granted by the Commission. It said:

> "In the first place, it is to be noted that the only orders passed by the Commission were for fourth-section relief and modification or suspension of existing rate orders of the Commission; and that these two orders are of themselves purely incidental to the main purpose of the proceeding before the Commission. Furthermore, it is to be noted that it is not clearly shown by the plaintiffs that they suffer any injury by virtue of these particular orders, which were merely a means to an end. The end itself, and the chief result of the proceeding before the Commission was merely to give permission to the carriers to file 'master' tariffs, carrying the increased rates, which the Commission determined, in the exercise of its discretionary power, it would not suspend. It is true that the roads asked for relief in a more positive and definite form, but this was denied by the Commission. The report of the Commission distinctly states that the plan of emergency charges is permissive in character and that the resulting rates initiated by the carriers 'will in all respects be subject to complaint and investigation to determine the reasonableness of the schedules and rates as provided by the Act'; and that what the Commission decided will not debar the plaintiffs from reparation orders in proper cases. *Arizona Grocery Co.* v. *Atchison T. & S. F. Ry. Co.*, 284 U.S. 270, 52 S. Ct. 183, 76 L. Ed. 348.
>
> "The result of the Commission proceedings, therefore, was merely to permit the railroads to initiate new rates." (11 F. Supp. at Pp. 492-493)

Note at this point that the Commission's action in *Ex Parte 259* is similar to that before the court in *Algoma*. It entered orders ". . . modifying all our outstanding orders to the extent necessary to permit the maintenance of the increased freight rates and charges herein authorized and granting relief from the provisions of section 4 of the act and our tariff publishing rules as may be necessary" (332 ICC at P. 792). With respect to the permissive nature of its orders, the Commission said:

> "Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed." (332 ICC at P. 715)

Having discussed the nature and effect of the proceeding before the Commission, the court in *Algoma* went on to say:

> "The position taken by the plaintiffs seems to misconceive the real nature and effect of the Commission proceeding. They take the view that what the Commission did in effect was to determine what would just and reasonable rates for particular traffic transported by particular railroads, on insufficient findings of fact. If this were really the situation confronting the court, it is clear enough as a result of recent Supreme Court decisions that the order of the Commission should be set aside if the plaintiffs have a standing to invoke that relief." (11 F. Supp. at P. 493-494)

> "As already pointed out, in our opinion this misconceives what the Commission did. It *prescribed* no particular rates. It merely permitted the carriers to file new rates without suspension. It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under section 13 (49 U.S.C.A. §13). That is to say, the increased rates now complained of are *carrier made* rates and not *Commission* made rates." (11 F. Supp. at P. 494)

The court then found that the action of the Commission in passing orders for fourth section relief and modifying its tariff rules was a matter within its administrative discretion and went on to comment:

> "As has been pointed out, it is not shown that these two orders prejudicially affect the plaintiffs. What does affect them is the failure of the Commission to suspend the new rates. But this again was clearly within the administrative discretion of the Commission under section 15(7) of the Act. (49 (U.S.C.A. §15(7)). Speaking of this, in Board of Railroad Commissioners *v.* Great Northern Ry. Co., 281 U.S. 412, 429, 50 S. Ct. 391, 396, 74 L. Ed. 936, the Chief Justice, for the Supreme Court said: 'Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. Interstate Commerce Act, §15(7); 36 Stat. 552; 41 Stat. 486, 487 (49 U.S.C.A. §15(7)). This power of suspension was intrusted to the Commission only.'

> From this it appears clearly enough that if the Commission in its discretion does not suspend the new rates, the courts have no power to do so." (11 F.Supp. at P. 495)

See also *Arrow Transp. Co.* v. *United States*, 372 U.S. 658 (1963); and *Luckenbach S.S. Co.* v. *United States*, 179 F. Supp. 605 (D. Delaware, 1959) vacated in part as moot 364 U.S. 280 (1960), for a discussion of the discretionary nature of the Commission's suspension powers.

The Court concluded the plaintiffs had no status to maintain the action as they had no independent legal right which was prejudicially affected by the Commission's orders. The court then relegated the plaintiffs to their proper statutory remedies stating:

> "The plaintiffs have mistaken their remedy in the statutory scheme of railroad rate making. Their contention is that the Commission, without sufficient evidence or proper findings of fact, has determined or fixed particular rates for the plaintiffs' particular traffic. But this misconceives what the Commission has actually done. It was not dealing finally with particular rates for particular traffic, but permitting increased rates for selected commodities, by a general order affecting all the railroads in the country. If the increased rates as applied to the plaintiffs' particular situation can be shown to be unjust and unreasonable, their remedy is clearly by proceedings under sections 13 and 15 of the act (49 U.S.C.A. §§13, 15) for individual relief, and for reparation orders under section 16(1) of the act." (11 F.Supp. at Pp. 495-496)

The *Algoma* precedent has been followed in two other three-judge court proceedings, *Koppers Company* v. *United States*, 132 F.Supp. 159 (W.D. Pa. 1955) and *Florida Citrus Commission* v. *United States*, 144 F.Supp. 517 (N.D. Fla. 1956) affirmed per cur. 352 U.S. 1021.[7]

In *Koppers* the Commission's order in a general revenue increase proceeding known as *Ex. Parte No. 175, Increased Freight Rates, 1951*, 284 ICC 589, was under attack. The court, quoting at length from *Algoma*, dismissed the complaint stating:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15 has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits. (132 F. Supp. 163)

In *Florida Citrus*, the court dismissed a complaint against a Commission order permitting nationwide increases in refrigeration charges. *Proposed Increased Refrigeration Charges*, 289 ICC 505.

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7. See also *Birmingham Slag Company* v. *United States*, 11 F. Supp. 486 (N.D. Ala. 1935) in which the court dismissed a complaint against the Commission's order in *Ex. Parte No. 115* on grounds similar to *Algoma*.

The court said:

> "As in the *Algoma* case, the Commission's order is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided." (144 F.Supp. at P. 523)
>
> "On the theory that we have under review a rate case rather than a revenue case, the plaintiffs assert they will have no opportunity for redress from the discriminatory effects of the increases in the charges as applied to specific situations unless we set aside the Commission's order. But, it appears, the plaintiffs, in this case as in *Algoma Coal & Coke Co.* v. *United States*, *supra*, and in *Koppers Company* v. *United States*, D.C.W.D. Pa. 1955, 132 F.Supp. 159, 161, have mistaken their remedy." (144 F.Supp. at Pp. 525, 526)
>
> "It has been settled that the Interstate Commerce Commission is without power to award reparations with respect to shipments which moved under rates approved or prescribed by it. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 52 S. Ct. 183, 76 L. Ed. 348. Cf. *Atlantic Coast Line Railroad Co.* v. *State of Florida*, 295 U.S. 301, 55 S. Ct. 713, 79 L. Ed. 1451. But this rule has no application under the permissive provisions of an order in a general revenue case such as is this case. Supported by substantial authority it was held in the *Algoma* case [11 F.Supp. 496] 'If the increased rates, as applied to the plaintiffs' particular situation can be shown to be unjust and unreasonable, their remedy is clearly by proceedings under sections 13

and 15 of the act (49 U.S.C.A. §§ 13, 15) for individual relief, and for reparation orders under section 16(1) of the act (49 U.S.C.A. § 16(1)). [Citing cases.] Nothing in the Commission case debars them from such relief.' This, we think, as expressed by the Secretary of Agriculture, is the law of the land, and it is applicable to the instant case." (144 F.Supp. at P. 527)

Conclusion

For the reasons herein stated the complaint should be dismissed.

Respectfully submitted,

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PLAINTIFFS'* MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

I.

Statement of Plaintiffs' Position.

Defendant, Interstate Commerce Commission ("Commission" or "ICC") moved this Court to dismiss the complaints in this proceeding on the ground that they each fail to state a claim upon which relief can be granted. Thus, the sole issue before the Court for decision is whether the facts alleged *in the complaints* set forth such a claim. Plaintiffs maintain that they do, since the facts alleged constitute violations of plaintiffs' Constitutional and statutory rights for which they are legally entitled to redress.

Therefore, it is most important for this Court to have clearly before it the exact facts alleged in the complaint, particularly since they have been inaccurately described and characterized by the defendant Interstate Commerce Commission in its "Memorandum in Support of Defendant's Motion to Dismiss," and because the intervening defendant railroads, in their "Memorandum in Support of Defendant ICC's Motion to Dismiss", have discussed alleged facts

* As used herein, "Plaintiffs" refers to the original plaintiffs to this action, seven eastern public utilities. While both the plaintiffs and the intervening plaintiffs maintain that the motion to dismiss must be denied, separate memoranda appear desirable, particularly in view of the fact that separate complaints are involved. However, in their memoranda plaintiffs and intervening plaintiffs have endeavored not to repeat each other's arguments in their separate memoranda.

which are not properly before this Court and not in issue here.

The allegations of plaintiff utilities' complaint, which, for the purpose of this Motion, are to be taken by the Court and all parties as established facts, are:

(A) In March, 1968 the Class I Railroads filed with the ICC "Master Tariff X-259", providing for rate increases on virtually all commodities ranging from 3% to 10%, and including an increase of 5% on bituminous steam coal (subject to a 15¢ per ton maximum) (utility plaintiffs' complaint, paragraph 6, hereinafter "¶").

(B) On June 19, 1968 (after allowing an interim overall increase of 3%), the ICC suspended the Tariff to January 23, 1969, and ordered investigatory hearings on the proposed increases (¶6).

(C) At the hearings, there was no evidence as to the justness and reasonableness of the proposed rates. The Commission did not itself affirmatively examine into the justness and reasonableness or other aspects of the proposed increases (¶9). No Bureau, Section, or employee of the ICC was a party to the proceedings nor was there any representation of the public interest by the ICC through its counsel or otherwise (¶10). There was no evidence by the railroads as to their costs for providing the transportation services involved with respect to any particular commodity; although such evidence was requested by plaintiffs throughout the proceedings, it was repeatedly refused by the railroads, which refusal was upheld by the ICC (¶12). There was no evidence in the record to rebut evidence presented by shippers that substantial loss of traffic would result from the proposed increases (¶13). There

was no evidence presented by the railroads to justify an increase of 5% on coal as compared to 3% on certain other commodities (¶14); but there was substantial and uncontroverted evidence that coal traffic, prior to such an increase, produced a disproportionate return to the carriers over and above the cost to them of providing that service (¶14).

(D) By the Order of January 23, 1969 (hereinafter "Order"), the ICC permitted the railroads to put into effect virtually all of the increases for which they had provided in the Master Tariff, specifically finding that the increased rates "will not exceed a maximum reasonable level," and that they "will have no undue adverse effect on the movement of traffic."

(E) The ICC based its findings respecting the effect of movement of traffic upon its opinion that "costs of other forms of transportation, and of competing fuels are also increasing" (332 ICC 734), for which opinion there is no supporting evidence, and upon the explicit assumption that "should competitive situations arise, appropriate adjustments can be made by producers and carriers", although there is not a scintilla of evidence in the record to support an assumption that "adjustments can be made by producers" (332 ICC 734).

(F) The plaintiffs are required by the Order to pay approximately $2,700,000 per year additional for the shipment of coal (¶5).

It should be clear from the foregoing that plaintiffs are *not* seeking to litigate the justness and reasonableness of increased coal freight rates which the railroads put into effect pursuant to the Commission's Order. They are seeking review of the methods used and record relied on by

the Commission in deciding that the increased rates proposed by the railroads were just and reasonable, and that those increased rates would not adversely affect the movement of traffic. It is the position of plaintiffs, and an established fact for the purposes of this Motion, that on the record made before the Commission (devoid of relevant proof) the Commission *could not determine* whether the rates were just and reasonable; nor could it determine the effect of such rates on movement of traffic. In the absence of a record adequate to make such affirmative findings, the Commission was required by the Interstate Commerce Act to disapprove the proposed changed rates (§§1(5), 15a(2)). Since the inadequacy of the record in this regard is admitted by the Motion, the sole issues are: 1. Is the Order approving changed rates in error, and 2. Is that Order reviewable.*

* In the ICC's "Statement of Material Facts Not in Dispute", paragraph numbered 9 states that:

> "Plaintiffs and intervening plaintiffs elected not to seek Commission review *of these rates* under Sections 13 and 15 of the Interstate Commerce Act (49 U.S.C. §§13 and 15) and *instead* filed this lawsuit."

"Of these rates" in paragraph #9 must refer to all of the rates permitted to be increased by the Commission's Order. A §§13 and 15 proceeding can be used only to attack the reasonableness of a rate. Plaintiffs are not seeking review of the reasonableness of coal and grain freight rates, they are seeking review of the Commission's method of determining that the proposed increases would result in just and reasonable rates. It may also be noted that paragraph numbered 5 in that document states that the railroads filed new tariffs in March, 1968, proposing "certain increases in the general level of freight rates," which may be slightly misleading. The tariffs proposed a multitude of specific increases, varying from 3% to 10%, in existing rates on virtually every commodity carried by the railroads. There is nothing contained in the tariffs relating to any "general level" of rates.

Plaintiffs' Memorandum in Opposition to Motion to Dismiss Complaint

II.

The Order is in Error Because it Violates the Constitutional and Statutory Rights of Plaintiffs

Plaintiffs agree with defendant Commission that when the railroads filed their Master Tariff X-259 in March, 1968, the Commission could have decided, without a hearing, to allow those rates to go into effect merely by refusing to suspend them (49 U.S.C. §15(7)). Plaintiffs also do not contest defendant's contention that such Commission action would have been clearly discretionary under the statute and would not have been judicially reviewable (*Arrow Transportation* v. *Southern R. Co.*, 372 U.S. 658 (1963)).

However, instead of merely allowing the rates to go into effect, the Commission ordered investigatory hearings. Once that order was made, the Commission was then bound to conduct that hearing in accordance with the Constitutional standards of due process and in conformity with the requirements of the Administrative Procedure Act and the Interstate Commerce Act. This it failed to do.

A. The Commission Violated Plaintiffs' Constitutional Rights by Delegating Its Function to Interested Private Parties and by Making Findings Not Founded on the Record.

The attitude of the Commission throughout its proceedings, as the complaints show, can be described by a paraphrase of a now-famous line—what's good for the railroads is good for the public—and a firm belief that the railroads know what's good for themselves. This philosophy, however, ignores the fact that the Commission has statutory duties to perform, and the plaintiffs have statutory and

Constitutional rights which preclude delegation of those governmental functions to private interested parties.

The most revealing exposition of this Commission philosophy is found in the facts stated in ¶13 of the utility plaintiffs' complaint. The Act specifically requires the Commission to give consideration to the adverse effect of increased railroad rates on the movement of traffic (§15(a)(2)). Voluminous evidence was presented by shippers that substantial loss of traffic would result from the increases—a fact which, of course, would not *per se* require rejection of the tariff but certainly, when combined with the statutory mandate, required some rebuttal by the carriers and independent review of the situation by the Commission.

However, there was no evidence at all from the carriers to rebut the shippers' proof (¶13). And the Commission attempted to discharge its duty by speculating that with respect to coal traffic "costs of other forms of transportation, and of competing fuels are also increasing" (332 ICC 734), for which there is no support in the record, and with a statement that "should competitive situations arise, appropriate adjustments can be made by producers and carriers" (332 I.C.C. 734). Since there is not a scintilla of evidence in the record regarding the ability of coal producers to make "adjustments", it is clear that the Commission attempted to discharge its duty by delegating to and accepting the judgment of the "carriers" as to whether the increases would result in rates that would reduce traffic volumes; and it also left to them the responsibility of determining and making whatever "adjustment" the carriers found "appropriate."

Plaintiffs' Constitutional rights have thus been violated in two respects. First, it is fundamental that a govern-

mental agency cannot delegate its duties to private interested parties, as the Commission here delegated to the carriers its own duty to determine the "competitive situation" and to make "appropriate adjustments." (*Lathrop* v. *Donohue*, 367 U.S. 820 (1961), *Matter of Fink* v. *Cole*, 302 N.Y. 216 (1951); *Group Health Ins. of N.J.* v. *Howell*, 40 N.J. 436, 193 A.2d 103 (1963)).

Secondly, due process requires that findings be based on substantial evidence in the record (*Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938); *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); 5 U.S.C. § 706(2)(E)). If there was some special "expertise" from which the Commission had knowledge *outside* the record regarding "costs of other fuels" or of "competing transportation"* it should have been indicated in the findings together with any special knowledge in its possesion regarding the ability of coal producers to make adjustments (5 U.S.C. § 552, *B. & O. R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968); *Gonzalez* v. *Freeman*, 334 F.2d. 570 (D.C. Cir. 1964)).

Similarly, there was no evidence in the record presented by the carriers as to the justness and reasonableness of the proposed rates (¶9), nor was there any evidence as to the cost of providing transportation services for any commodity (¶12). In these circumstances, the Commission should have held that the carriers had not met their statutory burden of proof and rejected the proposed change in rates. Instead, it proceeded to find, without evidence, that what the carriers wanted was "just and reasonable."

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* This would include, in this connection, non-ICC regulated carriers, such as oil tankers.

B. The Commission Violated Plaintiffs' Statutory Rights by Failing Itself Affirmatively to Develop an Adequate Record.

The Commission failed in its statutory duty to regulate affirmatively. Section 17(3) provides as follows:

> "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the *ends of justice*." (49 U.S.C. § 17(3), emphasis added).

Despite the foregoing, the Commission accepted the railroad's proposals, involving $470,000,000 in annual rate increases, without any bureau or section of the Commission being a party to these proceedings nor having the Commission represented by counsel.

The lack of Commission Staff participation necessarily resulted in an inadequate record because much vital statistical information on the railroads' current and past operations is provided to the Commission's Bureau of Accounts on a confidential basis and was not and is not availible to the shippers who are parties to this proceeding.*

The Commission noted that with respect to loss of traffic resulting from increases, predictions of the parties "are always dramatically opposed", opined that they thus have "limited probative value" and that therefore "evidential support more reliable and persuasive" would be required before an increase could be denied on this ground (332 I.C.C. 716). In light of its view of the "limited probative

* Whether or not the Commission utilized this *ex parte* information in arriving at its decision can only be guessed at; if it did, it was of course wholly improper (see case cited *supra*).

value" of evidence presented by the parties, an independent examination by the Commission was clearly called for; instead, the Commission made affirmative findings supinely accepting the opinions of one of the parties, the carriers, and rejecting what was in fact "voluminous, detailed and specific evidence" by the shippers (complaint paragraph 13).

It is well established that the Commission should be the "guardian of the public interest" in such proceedings as those in issue here, with an affirmative duty to protect that interest. However, that interest was accorded no protection whatsoever by the Commission in the Ex Parte 259 hearings.

The Commission has only recently been exhorted by the Supreme Court of the United States to better protect the public interest, (*Baltimore & Ohio Railroad Co.* v. *U. S. et al.*, 386 U. S. 372 at 436, Brennan, J., concurring opinion, (1967)):

> "Ultimately, however, the reason reliance upon the estimates of railroads of their own best interests is objectionable is simply that *the best interests of the railroads are not necessarily consistent with the public interest, and it is the latter which the Commission is directed to advance* . . . . The commendable industrial statesmanship demonstrated by the railroads on many occasions in these recent proceedings only serves, because of the cohesion this demonstrates . . . to aggravate the danger that 'grows out of the tendency of these giant corporations to compromise their own differences at the expense of the unorganized public' 2 Davis op. cit. supra [Admin. L.] 378. The regulatory agency must be the bulwark

against such compromise. It is 'a requisite for administrative viability' that '[t]he outlook of the Commission and its powers must be greater than the interest of the railroads, or of that which may affect those interests.' I.C.C. *v.* Chicago, R.I. & P.R. Co., 218 U.S. 88, 103". (Footnote omitted, emphasis supplied.)

In that same concurring opinion, Justice Brennan also said (at 429):

"The ICC is pre-eminently an agency 'directly and immediately concerned with the outcome of virtually all proceedings conducted before it. It is not intended to be a passive arbiter but the "guardian of the general public interest," with a duty to see that this interest is at all times effectively protected.' H.R. Doc. No. 678, Practices and Procedures of Governmental Control of Transportation, 78th Cong., 2d Sess., p. 53 (1944); see Southern Class Rate Investigation, 100 I.C.C. 513, 603. It is empowered to investigate and gather evidence beyond that presented by the parties where exercise of that power will advance the determination of what best serves the public interest.* To the same end, the agency

* "'A regulatory body such as the Interstate Commerce Commission cannot properly discharge its duty if it remains ignorant of relevant facts simply because they were not introduced in evidence. The Commission should itself supply deficiencies in the record. It should bring to light material which the parties have either overlooked or have willfully failed to call to its attention. It should aid those parties who through lack of resources are unable adequately to present their cases. It should make full use of the expert knowledge of commissioners and staff, and of the mass of transportation information that it has accumulated through the years.' H.R. Doc. No. 678, *supra*, p. 70. See *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U.S. 194, 208-210, 212, 216-217." (Footnote in original).

> has wide latitude in fashioning procedures, and a broad power to condition its approval of proposals. In other words, the ICC is not the prisoner of the parties' submissions.*"

Despite such statements from the Supreme Court the Commission assigned no lawyer from its staff to participate in these proceedings, nor did it call upon the expertise of such of its divisions as the Bureau of Accounts or the vast store of information available to it in its own files to make the record adequate.

Several law review articles have noted this Commission as the outstanding example of an administrative agency that fails to provide adequate protection for the public interest. For example, Ernest W. Williams, Jr., Esq. in an article relating to the Interstate Commerce Commission stated:

> "The more positive approach which the [Interstate Commerce] Act seems to require of the Commission will in most instances necessitate an enrichment of the record beyond the testimony and exhibits of the parties. In part the Commission may accomplish this by taking official notice of material in its files or otherwise available to it—a method which has been unnecessarily restricted in the ICC's practice.** In addition, the Commission must in strategic cases assign its limited staff resources to the task of preparing material which goes beyond the evidence supplied by the parties and examiners should do more

* (Footnote omitted).

** "See Davis, *Official Notice*, 62 Harv. L. Rev. 537 (1949)."

research following hearings and pending their reports*" (63 Harv. L. Rev. 1349, 1366 (1950)).

Professor Kenneth Culp Davis, a leading authority in the field of administrative law, has written as follows:

> "Congress has assigned to each regulatory agency the affirmative duty of securing all relevant information, whether produced by the parties or not.** The very reason for the creation of most regulatory agencies was the need for providing effective representation for a public interest not otherwise represented, a need which courts because of their passive character could not supply. *'One of the main reasons for the creation of the [Interstate Commerce] Commission,' observed Commissioner Eastman in a formal report, 'was the protection of those public interests which are rarely equipped for self-protection.'*"***

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* "'The I.C.C.'s habit of determining vital transportation policies almost exclusively on the basis of material supplied by private groups inevitably tends to warp the policies in favor of those who are most strongly represented and against the inadequately represented public interest.' *Id.* at 545; *cf.* Curry, *The Future Place of the Examiner in the Interstate Commerce Commission*, 17 ICC Pract. J. 309, 313 (1950). The task of the overloaded examiner in ascertaining that the public interest is appropriately reflected is little assisted by any formal tools."

** "See Landis, The Administrative Process 38-39 (1938): 'The test of the judicial process, traditionally, is not the fair disposition of the controversy; it is the fair disposition of the controversy upon the record as made by the parties . . . for [the administrative] process to be successful in a particular field, it is imperative that controversies be decided as "rightly" as possible, *independently of the formal record the parties themselves produce.* The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making."

*** "Southern Class Rate Investigation, 100 I.C.C. 513, 603 (1925)."

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"The regulatory agency's responsibility for taking the initiative in representing the public interest involves a small segment of one of the major enigmas of modern democratic government. The process of compromise that we call democracy usually concerns interests of powerful organizations. A danger increasingly felt grows out of the tendency of these giant organizations to compromise their own differences at the expense of the unorganized public. A basic challenge is to find methods and machinery which will protect against this danger. One of the chief governmental devices for meeting this challenge is the regulatory administrative agency. *The prime weakness of the regulatory agency* is not the much-publicized tendency toward governmental excesses but *is the little-recognized tendency of the agency sooner or later to succumb in greater or lesser degree to the persuasions of powerful groups that are supposed to be regulated.* This weakness is immeasurably aggravated if the agency must decide particular cases exclusively upon the basis of materials supplied to it "by private interests. Yet that is usually the practical result of applying to the regulatory agency the traditional doctrine of judicial notice.*" (Davis, "Official Notice," 62 Harv. L. Rev.,

* "Of course the agency's responsibility for protecting the public interest must be carried out in many ways in addition to assuring that the exclusive reliance will not be on facts brought in by those who are most powerfully organized. Official notice affects only a small facet of the large problem.* *For instance, the ICC has power to appoint special counsel to represent the public interest in any proceeding;* when the work of such counsel is effectively carried out, the special need for resort to extra-record materials may disappear. The same is true when staff members are required to conduct a sufficient prehearing research." (Emphasis added.)

537, 542-3 (1949)) (Emphasis added both in text and footnotes).

Interstate Commerce Commissioner Aitchison's statements concerning the obligations of administrative agencies to themselves develop an adequate record, as set forth in the Senate Subcommittee Hearings on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess., Apr. 29, 1941, 412 at 465-6, have been quoted with approval by a Federal Court of Appeals and by a Federal District Court:

> "They [administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are "adduced when the parties have not put them in. This requires and authorizes a sufficient survey of matters within the agencies files, and a reasonable use of the technical expertness and advice of members of the agencies staff . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . ."

Isbrandtsen Co. v. *U. S.*, 96 F. Supp. 883 at 892 (S.D.N.Y., 1951, affd. 342 U. S. 950, 1952); and see *Scenic Hudson*

Preservation Conf. v. *F.P.C.*, 354 F. 2d 608 at 621 (2d Cir. 1965), *cert. den.* 384 U. S. 941 (1966).

In the latter case, the FPC staff had taken an active part in the hearings before the examiner, had presented witnesses of its own, cross-examined applicant's and intervenors' witnesses, submitted briefs and exceptions to the examiner's decision, but the FPC was nevertheless reversed by the Court for not testing and supplementing evidence presented by the parties adequately to protect the public interest.

On this same point of the Commission's affirmative duty, in *Aberdeen & Rockfish R. Co.* v. *U. S.*, 270 F. Supp. 695 (E.D. La. (1967), affd. as modified, 393 U. S. 87 (1968)), the Court quoted with approval the language of another District Court as follows:

> "'The [Interstate Commerce] Commission is not a passive arbitrator of disputes between carriers. It is the instrument chosen by Congress to regulate interstate commerce in the public interest. When carriers fail to produce satisfactory evidence, the Commission may require them to produce additional and more satisfactory evidence. It may make its own investigation. It may consult with "other interrested and presumably better informed agencies of the Government as to particular question." Cantlay & Tanzola, Inc. *v.* United States, [D. C.,] 115 F. Supp. [72,] 81. However, the record does not disclose that any of those courses was followed in this case. *The fate of our national transportation system should not depend upon evidence either offered or withheld by competing carriers.*'" (Emphasis added by the court.) 270 F. Supp. 695, 711.

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"There is no doubt as to the Commission's statutory powers to require the development of adequate and comparable cost data. Section 12(1) of the Interstate Commerce Act authorizes the Commission to 'obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of [the Act]' (49 U.S.C. §12(1)). Section 20(1) of the Act expressly grants the Commission the power 'to require . . . special reports from carriers' and to require the carriers to provide 'full, true and correct answers to all questions upon which the Commission may deem information to be necessary' (49 U.S.C. §20(1)). This power was sustained in Baltimore & O. R. Co. *v.* ICC, 221 U. S. 612, 621 (1911)." id. at 712.

See also *Michigan Consolidated Gas Co.* v. *F.P.C.*, 283 F. 2d 204 at 226 (D.C. Cir. 1960):

"In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding."

Therefore, the Commission is required by its own statute, and by the Supreme Court and other courts to affirmatively develop an adequate record. Its failure to do so in the past has been severely criticized by the courts and by legal scholars. Despite the proliferation of adverse comment, the Commission persisted in the instant case in again failing to perform this legal duty.

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C. Plaintiffs' Rights Were Also Violated by Commission's Failure to Enforce the Burden of Proof Requirements of its own Statute and the Administrative Procedure Act.

Section 15(7) of the Act provides, in pertinent part, as follows:

> "At any hearing involving a change in a rate, fare, charge or classification, . . . after September 18, 1940, *the burden of proof shall be upon the carrier* to show that the proposed changed rate, fare, charge, classification . . . is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." (49 U.S.C. §15(7), emphasis added).

The Administrative Procedure Act, 5 U.S.C. §556(d) provides:

> "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

During the hearing in *Ex Parte 259,* when one of the examiners denied repeated motions made by shippers for the production of additional evidence, particularly on costs, he correctly noted that the railroads had the burden of proof to make out their *prima facie* case, and indicated that if the data they produced was insufficient to do so, the relief they sought would be denied. It is plaintiffs' position here that the railroads' data was completely insufficient to establish that the proposed increases would result in just and reasonable rates. However, the Commission now takes the position that it is *plaintiffs'* duty to bring a §13 or §15

proceeding to show that the proposed rates are *un*just and *un*reasonable!

In any such proceeding, the plaintiffs would clearly have the burden of proof to show that the present approved rates are unjust and unreasonable (*Koppers Co., Inc. v. Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 388 (1958)). It is submitted that to force plaintiffs to follow the §§13 and 15 route is to circumvent the burden of proof requirement which §15(7) so clearly places on the carrier railroad.

Any shipper suing in the Commission pursuant to §§13 and 15 of course will be faced with the decision in Ex Parte 259, which explicitly found that both the proposed rates and proposed level of rates were just and reasonable. In *Koppers, supra*, which was the proceeding in the ICC following the dismissal of the plaintiffs' complaint by the District Court, Koppers' attempts to meet the burden of proof necessary to overcome the decision in Ex Parte 175 were summarily dismissed:

> "The complainant introduced in evidence a series of exhibits containing certified copies of the record in the Ex Parte No. 175 proceeding bearing upon the level of the water-transportation costs as between the New England and the New York ports. In this manner, it purports to attack our order in that proceeding. Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." (303 I.C.C. 387, 388).

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In a recent decision, the Court of Appeals for the District of Columbia, Burger, J., writing the opinion, admonished the Federal Communications Commission in very strong terms that it had a duty to see that the burden of proof was borne by the proper party and sustained by it. See *United Church of Christ* v. *FCC*, 1965 et seq. [Fed.] CCH Util. L. Rep. ¶11609 (D.C. Cir. June 20, 1969).

In effect, what this Commission contends is that by making unreviewable findings without evidence in this proceeding, it may shift the burden of proof from the carriers, where Congress placed it, to the plaintiff shippers. It thereby forces these plaintiffs to prove to the Commission not only that the rates are *un*just and *un*reasonable, but that the Commission's earlier Order was in error. Such an attempt is clearly in violation of the intent and language of the statute.

Under the statute, the rate increases on bituminous steam coal must be shown by the carriers to be justified by specific and relevant record evidence before they can be found to be just and reasonable. However, no such evidence was offered by the carriers.

The railroads must have such data available; they must have determined how much it cost them to ship a trainload of coal before first determining the rate for that service. Nowhere had they denied the ready availability of this data. Certainly, on traffic movements such as these, they could have easily presented the data requested by plaintiffs.

The railroads try to excuse the lack of cost data in Ex Parte 259 by characterizing it as a "revenue" or "general revenue" proceeding (railroads' memorandum pp. 9, 12). However, the fact remains that the carriers increased their rates commodity by commodity, without showing any basis

for the unduly differing increases imposed on various commodities.

In Ex Parte 256, the last general rate increase before Ex Parte 259, the Commission said:

> "The facts reviewed in the preceding paragraphs demonstrate the necessity, in connection with any future general revenue proceeding, for petitioners, in sustaining their burden of proof, to undertake a realistic study of the unit costs of performing transportation services." 332 ICC 280, 285.
>
> • • •
>
> "While the evidence submitted, as hereinafter explained, is sufficient to justify the increases authorized, *we shall expect the petitioning railroads in any future general revenue proceedings to make a more complete disclosure of the facts* upon which they rely in support of the rates sought." 332 ICC at 286 (emphasis added).

The railroads adamantly refused to obey these strictures of the Commission. They submitted the same quantum of proof here as in Ex Parte 256 and repeatedly denied that any further evidence was necessary to make out their *prima facie* case.

The Commission elected, in the decision which plaintiffs here seek reviewed, to ignore its own instructions in Ex Parte 256 and to find that the total costs for all traffic were sufficient to meet its requirements. In so holding, it relied on *U.S.* v. *Louisiana*, 290 U.S. 70 (1933) in which the Supreme Court held that a Commission determination to permit rates to go into effect without "examining into particular rates

in a general revenue case" was acceptable. However, that case was decided under a prior version of §15(a), not the law presently in effect. In the prior statute the Commission was permitted in rate and revenue proceedings to consider the railroads "as a whole," either nationally or in rate groups or territories. Section 15(a) has been amended, however, to remove that provision and it has not been reinserted into the statute. Under the present law, the Commission is instead required to consider the effect of rates on the movement of traffic, and to consider the provision of an efficient transportation service at the lowest cost consistent with the furnishing of that service. "It is difficult to conceive of a reasonable rate which would ignore any one of these considerations." H.R. Rep. No. 193, 73d Cong. 1st Sess., 1933 at 30. Since the law under which *U. S.* v. *Louisiana* is no longer in existence, that case does not provide support for the Commission's decision in Ex Parte 259.

Therefore, plaintiffs' Constitutional and statutory rights have been violated by the Commission because it delegated its function to private, interested parties; made findings not founded on the record; failed to itself affirmatively develop an adequate record; and failed to enforce the legal burden of proof requirement.

III.

The Order of the Commission is Reviewable.

A. This Court is the Proper Forum for Review.

1. The Urgent Deficiencies Act and the Administrative Procedure Act Provide for Review.

The Urgent Deficiencies Act, now embodied in 28 U.S.C. §1336, provides as follows:

"Section 1336. Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Plaintiffs have complied with the procedures set forth in 28 U.S.C. §§2321-2325 relating to actions in district courts to enjoin orders of the ICC.

The Administrative Procedure Act, 5 U.S.C. §702, provides that

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Plaintiffs are adversely affected by the Commission's order to the extent of some $2,700,000 additional they must pay per year for the shipment of coal.

Section 706 of the Administrative Procedure Act empowers the reviewing Court to

"(2) hold unlawful and set aside agency action, findings and conclusions found to be—

. . .

(B) contrary to constitutional right . . .

. . .

(D) without observance of procedures required by law;

(E) unsupported by substantial evidence. . ." (5 U.S.C. §706)

Plaintiffs have demonstrated above that the Commission's Order meets all of the criteria of paragraphs (B), (D) and (E).

The order is thus reviewable under the above statutes. The Supreme Court of the United States has decided this question on three occasions. The first was *Rochester Telephone Corp.* v. *U.S.*, 307 U.S. 125 (1939), an appeal from a final decree by a three judge district court dismissing on the merits a bill to review an order of the Federal Communications Commission, which order had found Rochester subject to FCC jurisdiction. Justice Frankfurter, writing for the Court, found that the FCC Order was reviewable because it

> "was not a mere abstract declaration regarding the status of *the Rochester* under the Communications Act [footnote omitted], nor was it a stage in an incompleted process of administrative adjudication." (at 143)

The judgment rendered was a "final and undisputable basis of action as betwen the Commission and the defendant" (at 143). Justice Frankfurter did note that the order could be reviewed to determine "questions affecting Constitutional power, statutory validity and the basic prerequisites of proof". (at 140)

The scope of reviewability set in the *Rochester* case has been expanded by two more recent cases which also arose under the Urgent Deficiencies Act: *Columbia Broadcasting System* v. *U.S.*, 316 U.S. 407 (1942) and *Frozen Food Express* v. *U.S.*, 351 U.S. 40 (1956).

In the *CBS* case, the FCC had issued a rule providing for the non-renewal or revocation of licenses of stations whose

contracts with a broadcasting network contained certain proscribed conditions. The Court held the FCC regulation a reviewable "order", even though it did not formally apply to CBS, and no contracts or licenses had been cancelled. In deciding that review was possible despite this lack of finality, the Court said:

> "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend on future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it." 316 U.S. 407, 420.

In *Frozen Food Express,* the express company, a motor carrier not a party to the prior administrative proceeding, instituted a suit in the statutory (28 U.S.C. §2325) three-judge court to have the findings and order of the ICC enjoined and set aside. The findings related only to the status of certain agricultural commodities which the Frozen Food often carried. The order would have made it necessary for Frozen Food to obtain a Certificate of Necessity, where its carriage before the order was exempt. The possibility that the Commission might issue a cease-and-desist order and the legal consequences thereof were held by the Court to make this determination a reviewable order.

Furthermore, the above cases make clear that the existence of hollow procedured rights (e.g. §§13 and 15) does

not preclude review of an order in which the agency has decided all real substantive rights. We point out that to require the plaintiffs to proceed before the Commission pursuant to §§13 and 15 amounts to denying them any effective relief. Our research has failed to disclose a single instance where any shipper has obtained any adjustment in rates made effective following an Ex Parte Order of the Commission. See ICC language in the *Koppers* case, *supra.*

Justice Burger, writing in *Gonzalez* v. *Freeman, supra* at 575, held that:

> "Action challenged as a denial of due process—whether substantive in the sense of being arbitrary or by capricious classification or procedural in the sense of denying minimum safeguards—could be immune from judicial review, if ever, only by the plainest manifestation of Congressional intent to that effect." *Gonzalez* v. *Freeman,* 334 F2d 570 (1964), *cert. den.* 381 U.S. 904 (1965).

There is no such clear Congressional mandate in this case, but rather specific review procedures provided by Congress in the Urgent Deficiencies Act and the Administrative Procedure Act.

B. Defendants' Contentions that the Order is Not Reviewable Are Without Basis.

1. "Permissive" Nature of the Order.

Both the Commission and the railroads place great weight on the fact that the order of the ICC merely permitted the rates proposed by the railroads to go into effect, and did not

order them to be put into effect. That mere fact, they allege, makes the Order not reviewable. Cited in support of this theory are three cases: *Algoma Coal & Coke Co.* v. *U.S.*, 11 F.Supp. 487 (E.D. Va. 1935), *Koppers Co.* v. *U.S.*, 132 F.Supp. 159 (W.D. Pa. 1955) and *Florida Citrus Commission* v. *U.S.*, 144 F.Supp. 517 (N.D. Fla. 1956), affd. per curiam 352 U.S. 1021 (1957).

These cases are not relevant here because they challenge the *rates* put into effect, not the *constitutionality* of the Commission's methods of arriving at its order.

The fact, however, that the Order is termed "permissive" by the railroads would not estop this Court from reviewing it.

These cases stand alone amidst literally thousands of cases wherein "permissive" orders have been reviewed by the Courts. These cases include those which come before the ICC relating to railroad mergers. For example, *In the Matter of the Merger of the Penn Central RR and the N. Y. Central RR*, 327 I.C.C. 475, 328 I.C.C. 304, 330 I.C.C. 328, 331 I.C.C. 643, 331 I.C.C. 754 and 334 I.C.C. 25, wherein the Commission finally authorized (i.e., permitted but *did not require*) the merger. The Penn Central merger was reviewed twice by the U.S. District Court for the Southern District of New York, *Erie-Lackawanna RR* v. *U.S.*, 259 F.Supp. 964 (1966), *Erie-Lackawanna RR* v. *U.S.*, 279 F.Supp. 316 (1967), and twice by the Supreme Court of the United States in *Baltimore and Ohio R. Co.* v. *U.S.*, 386 U.S. 372 (1967) and *Penn Central Merger Cases*, 389 U.S. 486 (1968). If this permissive Order was not reviewable, then the courts have been engaged in exercises in futility.

When the I.C.C. authorizes an applicant motor carrier to serve a route, such order is reviewable *Yale T. Corp.* v. *U.S.*,

210 F.Supp. 862 (1962) (aff'd. 373 U.S. 540 (1963)); when the Federal Power Commission authorizes an applicant to construct a hydroelectric plant, that order is reviewable (*Scenic Hudson Preservation Conf.* v. *FPC*, 354 F.2d 608 (2nd Cir. 1965), *cert. den.*, 348 U.S. 941 (1966)); when the FPC authorizes a natural gas company to construct an interstate pipeline, such orders are reviewable (*Skelly Oil Co.* v. *Phillips Petroleum*, 174 F.2d 89 (1949), aff'd. 339 U.S. 667 (1950)); when the CAB authorizes an airline to serve a particular route, such orders are reviewable (*C.A.B.* v. *State Airlines, Inc.*, 338 U.S. 572 (1950)).

All of the above orders are "permissive" in nature: none of them order the applicant to proceed, they merely permit him to. To say that this Court should not review an order merely because it is "permissive" is ridiculous in the face of overwhelming precedent. The railroads have already proceeded under the Order and are collecting the higher rates from plaintiffs.

Furthermore we note that the procedural steps which took place in the Commission in the *Algoma* line of cases are distinguishable from those followed here. Those significant differences are more fully outlined in the memorandum submitted herein by intervening plaintiffs.

2. All administrative remedies have been exhausted.

What plaintiffs are here seeking is review of the Commission's Order of January 23, 1969. In no other manner and in no other forum is that Order reviewable. Upon defendant's theory, no action could be taken by plaintiffs which could make that Order reviewable.

The I.C.C.'s statement herein is devoted to one point only: that plaintiffs may not attack two rates approved by

the Commission in a general increase proceeding. Plaintiffs are not attacking two rates: they are attacking the Commission's Order approving the entire Master Tariff on the grounds that the procedures followed by the Commission in arriving at that Order violated their constitutional and statutory rights. A §13 proceeding would not permit review of these issues.

IV.

CONCLUSION.

The complaint sets forth a cause upon which relief can be granted.

The defendants' motion should be denied.

Respectfully submitted,

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Atlantic City Electric Company
Central Hudson Gas & Electric Corp.
Consolidated Edison Company of New York, Inc.
Niagara Mohawk Power Corporation
Orange & Rockland Utilities, Inc.
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July 28, 1969.

[Certificate of Service Omitted in Printing]

MEMORANDUM OF INTERVENING PLAINTIFFS IN OPPOSITION TO THE MOTION TO DISMISS

In The

United States District Court

Southern District of New York

[Title Omitted in Printing]

Preliminary Statement

Separate memoranda, presenting quite different arguments, were filed in this action by defendant Interstate Commerce Commission ("Commission") and by intervening defendants, Aberdeen and Rockfish Railroad Company, et al. ("Railroads") in support of the Commission's motion to dismiss. While both the plaintiffs and the intervening plaintiffs maintain that the motion to dismiss must be denied, separate memoranda appear desirable, particularly in view of the fact that separate complaints are involved. However, plaintiffs and intervening plaintiffs have endeavored not to repeat arguments in the separate memoranda.

Statement of the Case

In the memoranda filed by defendant Interstate Commerce Commission* and by the intervening defendants, Aberdeen and Rockfish Railroad Company, et al. in support of the Commission's motion to dismiss, the real issue before the Court at this time has been largely obscured.

The question presented by the Commission's motion to dismiss is a simple one: Are the Commission's decisions and orders in this case, made after full investigation and

* Defendant United States of America neither supports nor defends the Commission's order.

hearing, permitting the railroads to increase their freight rates, subject to judicial review?

The answer is equally simple: The law is clear that where the railroads file a new tariff and the Commission, in the exercise of its discretion, permits the new rates to become effective without suspension or investigation, its decision is not reviewable, but that where, as in this case, the Commission does suspend and investigate proposed new rates and, after full investigation and hearing, permits them to become effective, its decision and final order are subject to judicial review.

On March 11, 1968, the railroads filed with the Commission a master tariff and connecting link supplements proposing to increase their freight rates on virtually all commodities by various amounts ranging from 3 to 10 percent. The tariff was originally scheduled to become effective May 27, 1968, but the effective date was voluntarily postponed until June 24, 1968. By order entered June 19, 1968, the Commission permitted the railroads to file a tariff increasing their rates by a uniform 3 percent but pursuant to its power under Section 15(7) of the Interstate Commerce Act (49 U.S.C. §15(7)), the Commission (1) suspended the effectiveness of the tariff proposing increases of from 3 to 10 percent from June 24, 1968, until January 24, 1969, the maximum 7-month period provided for in Section 15(7), and (2) instituted an investigation of the tariffs containing both the suspended and the permitted increases. (332 I.C.C. at 595)

Section 15(7), the statutory provision here involved, provides in pertinent part:

> "(7) Whenever there shall be filed with the Commission any schedule stating a new . . . rate, . . . the

> Commission shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, . . . and pending hearing and decision thereon . . . to . . . suspend the operation of such schedule . . . but not for a longer period than seven months beyond the time when it would otherwise go into effect; and, after full hearing, . . . the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. . . . At any hearing involving a change in a rate, . . . the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable . . ."

After hearing on the merits, the Commission issued its interim report and order, dated November 25, 1968 (332 I.C.C. 590) and its final report and order, dated January 9, 1969 (332 I.C.C. 714). In its final report, the Commission found (332 I.C.C. at 789-790):

> "Except where specifically otherwise stated we find the proposed increases just and reasonable."

Thus, the Commission's decisions and orders were made after full hearing on the merits in an investigation-and-suspension proceeding under the provisions of Section 15(7). As we show below, such decisions and orders are clearly reviewable, and the motion to dismiss should be denied.

Intervening Plaintiffs' Memorandum in Opposition to Motion to Dismiss

ARGUMENT

I.

The Commission's Orders, After Hearing, in Proceedings Under Section 15(7) are Subject to Judicial Review.

Under the statutory scheme of rate-making, the railroads have the right to initiate rate changes. When the railroads file a tariff proposing rate changes and the Commission, in the exercise of its discretion, declines to suspend and/or investigate the new tariff, it is well-established that its action is not subject to judicial review. An objecting party must first file a formal complaint with the Commission under the provisions of Sections 13 and 15 (49 U.S.C. §§13, 15). Only after such a complaint has been dismissed by the Commission may an objecting party seek Court review.

Where the railroads propose limited or minor changes in their rates, the tariffs are immediately filed with the Commission. Where, however, the railroads propose increases in all or almost all of their freight rates, a different procedure is followed. Since it would be a tremendous if not impossible task to re-publish the myriad of tariffs on file with the Commission, the railroads petition the Commission for relief from the tariff-filing requirements of Section 6 (49 U.S.C. §6) in order to file a "master" tariff or tariffs, with connecting link supplements, providing for the proposed general increases. Such authority was sought herein by the railroads on March 7, 1968, and granted by the Commission the following day.

With regard to making the increased rates effective, the railroads have followed two different procedures. Some-

times, as in this case, they initially file the master tariff proposing the rate increases. More often, however, at the time they petition for Section 6 relief, they also petition the Commission to institute an investigation into the adequacy of their existing rates and to authorize increases therein. When this procedure is followed, the Commission considers the petition and issues its report indicating what increases it would consider just and reasonable. Only then do the railroads actually file the master tariff or tariffs providing for the rate increases authorized by the Commission, which are invariably allowed to become effective without suspension and/or investigation. That was the procedure followed in Ex Parte No. 115, *Emergency Freight Charges, 1935*, 208 I.C.C. 4 (1935); Ex Parte No. 175, *Increased Freight Rates, 1951*, 284 I.C.C. 589 (1952); and Docket No. 31342, *Proposed Increased Refrigeration Charges*, 297 I.C.C. 505. In all three cases, the Commission declined to suspend and/or investigate the tariffs, published in accordance with its authorization.

Where the railroads have filed such a petition and the Commission has issued an order authorizing increases and has declined to suspend and/or investigate the tariff subsequently filed, it is questionable whether the Commission's action is subject to judicial review. In *Algoma Coal & Coke Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va. 1935), which was an appeal from the Commission's decision in Ex Parte No. 115, the Court held that "if the Commission in its discretion does not suspend the new rates, the courts have no power to do so." (11 F.Supp. at p. 495).

The *Algoma* decision was followed in *Koppers Company* v. *United States*, 132 F.Supp. 159 (W.D. Pa. 1955), which involved the Commission's decision in Ex Parte No. 175.

In that case, however, there were two additional important facts. Koppers had not been a party to the proceedings before the Commission and had already filed a formal complaint under Section 13, which was pending at the time it was seeking judicial review. The Court properly ruled that Koppers had not exhausted its administrative remedies.

The *Algoma* and *Koppers* decisions were cited with approval by the Court in *Florida Citrus Commission* v. *United States*, 144 F.Supp. 517 (N.D. Fla. 1956), *aff'd mem.* 352 U.S. 1021 (1957), which was an appeal from the Commission's decision in *Proposed Increased Refrigeration Charges, supra.* In the *Florida Citrus* case, however, the majority of the Court did review the matter on its merits and held that the Commission's order in the case, which it considered a general-increase proceeding, was supported by substantial evidence. That case supports the argument that, even where the Commission does not suspend and/or investigate the subsequently filed tariff, its order authorizing general rate increases is subject to judicial review.

In our view, the *Florida Citrus* decision was correct and the *Algoma* and *Koppers* decisions were wrong. Where the Commission, pursuant to a petition by the railroads, authorizes certain rate increases as just and reasonable, its decision and order, *if made after full hearing,* is reviewable, even if the Commission declines to suspend or investigate the subsequently filed tariff. In the *Florida Citrus* case, the majority of the Court—correctly, we think—reviewed the Commission's decision and order on the merits, and its decision was affirmed by the Supreme Court. The *Algoma* and *Koppers* decisions were not appealed to the Supreme Court.

In this case, the Court need not decide whether it should follow the decisions in *Algoma* and *Koppers* or that in

Florida Citrus, since those cases involved completely different factual situations from that presented here. In this case, the railroads did not petition the Commission to investigate the adequacy of their existing rates and to authorize increases therein. Instead, immediately after receiving Section-6 relief on March 8, 1968, the railroads on March 11, 1968, filed their master tariff proposing the rate increases which were to become effective June 24, 1968. As the railroads correctly state in their memorandum (at pp. 8-9):

> "Following oral argument on June 13-14, 1968, the Commission elected to suspend the effectiveness of the *Ex Parte 259* tariff for the statutory seven-month period allowed under Section 15(7). Its order of June 19, 1968, suspended the tariff until January 23, 1969, and instituted an investigation."

And, as pointed out above, in its final report dated January 9, 1969, the Commission after hearing on the merits found (332 I.C.C. at 789-790):

> "Except where specifically otherwise stated we find the proposed increases just and reasonable."

Thus, unlike the situation before the Courts in the *Algoma, Koppers* and *Florida Citrus* cases, where the Commission had declined to suspend and/or investigate the tariffs, the Commission in this case *did* suspend and investigate the master tariff pursuant to its powers under Section 15(7), and, after full hearing, found the "proposed increases just and reasonable."

While it is firmly established that the Commission's refusal to suspend and/or investigate a new tariff is not

subject to judicial review,* it is equally well established that where, as in this case, the Commission does suspend and institute an investigation under Section 15(7), its decision and order after hearing *are* subject to review by the Courts. In a memorandum to the Supreme Court of the United States filed jointly with the United States last month in *City of Chicago* v. *United States* (No. 1363 and No. 1364, October Term, 1968, re-numbered as Nos. 101 and 102, October Term, 1969), the Commission stated (at p. 7):

> "Under Section 15(7) a Commission decision as to whether to suspend a new rate cannot be judicially reviewed, *Luckenbach Steamship Company* v. *United States,* 179 F. Supp. 605 (D. Del.), modified on other grounds, 364 U.S. 280, just as a decision not to investigate a proposed train discontinuance cannot be reviewed. [footnote omitted] On the other hand, it is well established that after consideration of the merits by the Commission, its final decision not to set aside a new rate is reviewable. *E.g., Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U. S. 671." [footnote omitted]

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* A more difficult question is presented where the Commission initially orders suspension and investigation, but shortly thereafter, *without any hearing,* enters an order vacating the suspension. That was the situation in *Carbon Black—Southwest to U.S.A. and Canada,* 298 I.C.C. 721 (1955). The District Court in *Amarillo-Borger Express, Inc.* v. *United States,* 138 F. Supp. 411 (N.D. Tex. 1956), reversed the Commission, but the Supreme Court remanded with directions to dismiss as moot in *United States* v. *Amarillo-Borger Express, Inc.,* 352 U.S. 1028 (1956). In this case, of course, the Commission's interim and final decisions and orders were made after a *full* investigation and hearing.

In short, the Commission's decisions and orders in this case, made "after consideration of the merits" in an investigation-and-suspension proceeding under the provisions of Section 15(7), are clearly subject to review by this Court.

II.

A Commision decision and order under Section 15(7) is reviewable even though it involves general increases in rates.

In their memorandum, the railroads repeatedly stress that the proceeding before the Commission involved a general increase in virtually all rates. This, however, in no way precludes judicial review of the Commission's decisions and orders. If it did, it would mean that if the Commission in a Section 15(7) proceeding after full hearing and consideration of the merits decides not to set aside an increase in one or a few rates, its order would be subject to judicial review, but that if it decides not to set aside increases in virtually all freight rates, its order would not be reviewable. Merely to state the proposition is to demonstrate its absurdity.

III.

Permissive orders of the Commission, entered after a full hearing, are reviewable by the Courts.

The railroads in their memorandum also rely heavily on the fact that the Commission's orders in this case are merely "permissive" in that the railroads were not required to make effective the rate increases which the Commission found just and reasonable. Some "permissive" decisions of the Commission are admittedly not

reviewable. Where, for example, the Commission, in the exercise of its discretion, decides not to investigate and/or suspend a new tariff or decides not to investigate the proposed discontinuance of interstate passenger trains under the provisions of Section 13(a)(1) (49 U.S.C. §13(a)(1)), its decision to permit the new tariff to become effective or to allow the train to be discontinued is clearly not reviewable.

Where, however, the Commission, pursuant to its powers under Section 15(7), decides to investigate a new tariff, its final order after hearing is clearly reviewable, even though it may be "permissive" in nature. In most proceedings under Section 15(7), the Commission does not, although it could, "prescribe" rates which the railroads must thereafter maintain. Usually, the Commission merely finds the new rates "just and reasonable" or "not shown to be unjust or unreasonable or otherwise unlawful" and permits the carriers to make the rates effective if they so choose. But where the Commission has instituted an investigation under Section 15(7), its final order after hearing is subject to judicial review, regardless of whether the Commission approves or disapproves the proposed rates or prescribes entirely new rates. We know of no case where a Court has ever held that a final order of the Commission after investigation and hearing in a Section 15(7) proceeding is not reviewable, and the defendants have cited no case so holding.

In addition to final orders in Section 15(7) proceedings, the Commission issues many other types of final orders after hearing which are unquestionably reviewable, although "permissive" in nature. For example, in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 328 I.C.C. 304, 330 I.C.C. 328, 331 I.C.C.

643, 331 I.C.C. 754, and 334 I.C.C. 25, the Commission authorized the merger of the Pennsylvania and New York Central railroads. Its order was merely permissive in that the carriers were not required to exercise the authority granted. Before the merger was actually consummated, the Commission's orders in that case were reviewed twice by the District Court for the Southern District of New York in *Erie-Lackawanna Railroad Co.* v. *United States*, 259 F.Supp. 964 (1966), and in *Erie-Lackawanna R.R.* v. *United States*, 279 F.Supp. 316 (1967), and twice by the Supreme Court in *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372 (1967), and *Penn-Central Merger Cases*, 389 U.S. 486 (1968). If, as the railroads contend, permissive orders of the Commission are not reviewable, the Courts have wasted a lot of time on the *Penn-Central Merger* case.

The fact that a Commission order after hearing in an investigation-and-suspension proceeding under Section 15(7) may be "permissive" in nature is clearly no bar to judicial review. It is well-established that such a "permissive" order, as well as many other types of "permissive" final orders of the Commission, are subject to review by the Courts.

IV.

Plaintiffs have exhausted their administrative remedies.

In its memorandum, the Commission contends that plaintiffs have not exhausted their administrative remedies and must first file a formal complaint with the Commission pursuant to Sections 13 and 15. This is clearly not so.

Intervening Plaintiffs' Memorandum in Opposition to Motion to Dismiss

There are two ways in which the lawfulness of new rates may be challenged. Where the railroads file a tariff providing for rate increases or other changes, objecting parties can and usually do protest and ask the Commission to suspend and investigate the new rates under the provisions of Section 15(7). In this case the Commission was asked to, and did, suspend and investigate the master tariff providing for increases of from 3 to 10 percent. Where, however, the Commission, in the exercise of its discretion, refuses to suspend and/or investigate and permits the new rates to become effective, their lawfulness can be attacked only by filing a formal complaint under the provisions of Sections 13 and 15.

Theoretically, if the Commission suspends and investigates a new tariff under Section 15(7) and refuses to set aside the new rates, an objecting party may still file a complaint under Section 13. Such action, of course, is usually, if not always, fruitless, since the question before the Commission is the same in both cases. We know of no case where the Commission, after a Section 15(7) investigation-and-suspension proceeding, permitted new rates to become effective, and then immediately turned around and found them unlawful in a Section 13 complaint proceeding. If there are any such instances, they are very few and far between. In this connection, it might be pointed out that after the Commission permitted the rate increases in Ex Parte No. 175 to become effective without suspension or investigation, the Section 13 complaint filed by Koppers was, of course, dismissed by the Commission in *Koppers Co., Inc. v. Chesapeake & O. Ry. Co.*, 301 I.C.C. 284 (1957), 303 I.C.C. 383 (1958), and the Commission's decision was upheld in *Koppers Company, Inc. v. United States*, 166 F.Supp. 96 (W.D. Pa. 1958).

Intervening Plaintiffs' Memorandum in Opposition to Motion to Dismiss

As pointed out above, it is well-established that a Commission order after hearing in a Section 15(7) investigation proceeding is subject to judicial review and many, probably hundreds, of such orders have been reviewed by the Courts.*

Where, as in this case, the final order is by the entire Commission, it is ripe for judicial review without any further proceedings before the Commission, and plaintiffs had every right to bring their action. The intervening plaintiffs, although not required to do so, did seek reconsideration by the Commission. In its final report, the Commission stated that its findings as to justness and reasonableness "will not preclude interested parties from bringing any maladjustments to our attention for correction." (332 I.C.C. at 792) Pursuant to the invitation, intervening plaintiffs filed petitions for reconsideration on January 31, 1969, which the Commission summarily denied by order dated March 26, 1969, "for the reason that sufficient grounds have not been presented to warrant granting the actions sought."

Had the Commission, in its June 19, 1968 order not suspended and instituted an investigation into the lawfulness of the rate increases, at least some of the plaintiffs and intervening plaintiffs would, as suggested by the Commission, probably have filed formal complaints under Section 13 at that time. Such complaints might well have been decided by now. But the Commission *did* suspend and institute an investigation during which, as stated in

* The Commission's annual reports refer to numerous decisions in such investigation-and-suspension proceedings which have been reviewed by the District Courts. See, *e.g.*, 70th Annual Report of the Interstate Commerce Commission, dated November 1, 1956, at pp. 195-197.

the Commission's final report, it was to consider "the lawfulness of the proposed and interim increases as they applied to specific commodities and services" and "the evidence and arguments of all parties with respect thereto." (332 I.C.C. at 714)

Prior to 1910, the Commission had no power to suspend proposed rate changes, and the railroads were free to publish whatever rates they chose, the lawfulness of which could be challenged only by filing a formal complaint. In one of the first and the leading case interpreting the Commission's new power to suspend and investigate rate changes, *Advances in Rates, Western Case*, 20 I.C.C. 307 (1911), the Commission stated (at p. 314):

> "The question before the Commission [in an investigation-and-suspension proceeding] is that which would have arisen had the rates gone into effect and a formal complaint been made against them as unjust and unreasonable. * * * For 'the Commission may make such order in reference to such rate * * * as would be proper in a proceeding instituted after the rate had become effective.'"

In *Ayrshire Corp. v. United States*, 335 U.S. 573, 583 (1949), the Supreme Court referred to *Advances in Rates, Western Case, supra*, as reflecting "the view of the Commission [regarding Section 15(7)] since the beginning" and said "we think it is the correct one." In this case, the Commission modified the railroads' proposal in several respects (322 I.C.C. at 791-792), but found the 6-percent increase in the rates on grain, feed and feed ingredients "reasonable" (p. 754) and authorized the 5-percent increase in the rates on coal (pp. 726-734).

Instead of bringing this action, the plaintiffs could, as suggested by the Commission, begin an entirely new proceeding by filing a formal complaint, in which case they, instead of the railroads, would have the burden of proof. There is, however, no requirement that they do so and, in view of the language in the decisions quoted above, it is extremely doubtful that anything would be accomplished thereby. Moreover, the complaints herein attack the procedure followed by the Commission in *Ex Parte No. 259*, and this issue obviously could not be raised in a new Section 13 complaint. So far as the proceedings before the Commission in *Ex Parte No. 259* are concerned, plaintiffs have exhausted their administrative remedies and are clearly entitled to judicial review of the Commission's decisions and orders.

V.

The Defendants have failed to justify denial of intervening Plaintiffs' right to Judicial Review.

The Commission order under review is, according to the "Commission's Statement of Material Facts Not In Dispute," a "final" report and order. Thus, unlike cases involving the exercise of the Commission's "interim" suspension powers, this Court is now being requested to review the Commission's "completed task." See *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 671 (1963). The authorities advanced by defendants which establish the nonreviewability of agency decisions to suspend, or not to suspend, a matter consistently held to be committed to agency discretion, and closely analogous to judicial injunctions *pendente lite*, have no bearing on the reviewability of the instant Commission order. The intervening plain-

tiffs do not challenge a suspension decision involving "only a brief and informal hearing," Cf. *Arrow Transportation Co., supra,* 372 U.S. 672, but instead challenge a Commission order following a full investigation and hearing, and a "final" decision specifically finding that both the individual rate increases proposed on grain, and feed ingredients, and the resulting increased rates, are "just and reasonable," and do not exceed "a maximum reasonable level." 332 I.C.C. 754, 792. Defendants' opposition to review of such an order, to the extent based upon the nonreviewability of suspension orders, is clearly misplaced.

VI.

Conclusion.

For the reasons set forth above, the Commission's motion to dismiss should be denied.

Respectfully submitted,

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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

REPLY MEMORANDUM OF DEFENDANT INTERSTATE COMMERCE COMMISSION AND OF RAILROAD INTERVENORS IN SUPPORT OF MOTION TO DISMISS

In The

United States District Court

For the Southern District of New York

[Title Omitted in Printing]

Preliminary Statement

The Commission and Railroads hereby reply to the memoranda of plaintiffs and intervenor-plaintiffs in opposition to the motion to dismiss. Because the approach of those groups differs, a separate reply will be made to each.

I.

Reply to Plaintiffs Atlantic City Electric Company, et al.

A. Reply to Argument That the Commission Order Is Invalid. (Plfs. Memo PP. 5-21)

The first defense asserted by the Commission in its answer to the complaint herein is:

> ". . . that the complaint fails to state a claim upon which relief can be granted because the orders of the Commission here under attack are not reviewable . . ."

The plaintiffs and intervenor-plaintiffs by motion urged this court to set procedures for separate determination of that defense which, if held sufficient, "will dispose of the proceeding and eliminate the necessity of considering the

arguments upon the merits." See *Koppers Company* v. *United States*, 132 F. Supp. 159, 160 (W.D. Pa. 1955). The court granted plaintiffs' request for separate ruling on that defense. In its memorandum in support of its motion to dismiss the Commission stated that the issue under its first defense is:

> "Whether individual shippers attacking only two rates may seek judicial review of a Commission order which approved the general level of rates but which did not pass on the reasonableness of the particular rates attacked by plaintiffs." (P. 3)

The intervenor-plaintiffs in their statement of the question recognize that the issue on this motion is simply one of whether or not the Commission's order is subject to judicial review. (Memo P. 2) The railroads in their memorandum in support of the motion to dismiss also treated that as the sole issue in this motion.

However, plaintiffs, which originally asked to have that issue determined prior to any questions of the merits of the case, now state that:

> ". . . The sole issues are: 1. Is the Order approving the changed rates in error, and 2. Is that Order reviewable?" (Memo P. 4)

Logically these questions should be answered in reverse order. Only question 2 is presented for determination now. In support of their argument that the Commission order is in error plaintiffs have made a lengthy argument that it violates constitutional and statutory rights of plaintiffs. That argument, when analyzed, is in reality an argument that the Commission's order is contrary to the evidence or is not supported by the evidence. The Com-

mission and Railroads submit that there was no such deficiency in the record.[1] However, no specific reply will be made to those arguments here as those issues are not before the court on this motion.

B. Reply to Plaintiffs' Argument That the Commission Order Is Reviewable. (Plfs. Memo PP. 22-28)

Plaintiffs quoted 28 USC §1336, which confers jurisdiction on District Courts to enjoin and set aside orders of the Interstate Commerce Commission, and 28 USC §§2321-2325, which deal with the procedure in suits to set aside orders of the Commission. (Memo P. 22) The relevance of those provisions to the issue of whether the Commission order here is reviewable is not explained. In *Algoma Coal & Coke Co.* v. *U. S.*, 11 F.Supp. 487 (E.D. Va 1935), those provisions were held not to permit judicial review of an order similar to that here. Plaintiffs also quote sections of the Administrative Procedure Act. The Commission and Railroads recognize that the A. P. A. applies to reviewable Commission action. However, the sections cited shed no light on the question of whether the order here is reviewable. It should be noted that the *Koppers* and *Florida Citrus Commission* v. *United States*, 144 F.Supp. 517 (N.D. Fla. 1956), affd. *per curiam* 352 U.S. 1021 (1957), upon which the Commission and Railroads rely, were decided after enactment of the A. P. A. in 1946. Moreover, in *Public Utilities Comm. of State of Cal.* v. *United States*, 356 F.2d 236, 239-240 (9th Cir. 1966), cert. den., 358 U.S. 816 (1966), the court held that the A. P. A. definition of reviewable orders was derived from *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370

1. The court could not determine this issue without review of the entire record before the ICC.

(1932), where the Supreme Court drew the distinction between carrier-made rates, as here, and Commission-made rates. The Circuit Court of Appeals also quoted *Algoma* with approval.

Plaintiffs cite four cases in which agency orders were held to be judicially reviewable. However, those orders are not comparable to the order of the Commission here involved. The Commission specifically held that its determination as to rates applies only:

> ". . . to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act." (332 ICC at P. 792)

Contrast that with the order held reviewable in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939) which was cited by plaintiffs. In that case the order of the FCC was a determination of status. That determination was held reviewable by the company whose status was determined because it "necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed to all carriers amenable to the Commission's authority." (307 U.S. at P. 144)

Similarly, in *Columbia System* v. *United States*, 316 U.S. 407 (1943), regulations of the FCC entered after a rule-making investigation were held to be reviewable. There the regulations governed the contractual relations between

radio stations and networks. The Supreme Court noted that compliance by radio stations with the mandatory regulations had caused injury to the networks and held:

> "Such regulations have the force of law before their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of §402(a) and the Urgent Deficiencies Act . . ." 316 U.S. at P. 418-419)

Frozen Food Exp. v. *United States*, 351 U.S. 40 (1956), also cited by plaintiffs, involved an order that specifically determined that the transportation of certain commodities by motor carriers was not exempt from Commission regulations under the provision of 49 U.S.C. §203(b)(6). In holding that order to be reviewable the Supreme Court said:

> ". . . Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks. A carrier authorized to carry specified commodities and dependent on exempt articles for its return load may lose its right to operate at all, if it does not respect the Commission's 'order.' Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The 'order' of the Commission is in substance a 'declaratory' one, see 60 Stat. 240, 5 U.S.C. §1004(d), which touches vital interests of carriers and shippers alike and sets the standard

for shaping the manner in which an important segment of the trucking business will be done. Cf. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407. The consequences we have summarized are not conjectural. The Commission itself places this interpretation on its action and argues, contrary to its position in the *Los Angeles Case, supra*, for finality of the order . . ." (351 U.S. at P. 44-45)

The last case cited by plaintiffs on this point is *Gonzalez* v. *Freeman*, 334 F.2d 570 (C.A. D.C. 1964), *cert. den.* 381 U.S. 904 (1965). In that case a final order of the Secretary of Agriculture prohibited plaintiff from participating in contracts with Commodity Credit Corporation. There was no provision for further proceeding before the Department of Agriculture. The court held that the action of the Secretary of Agriculture was subject to judicial review.

These cases have been discussed at some length only to demonstrate that they do not involve agency orders or action of the type plaintiffs seek to set aside here.

None of those cases involve the administrative problem in revenue cases such as this. See *United States* v. *Louisiana*, 290 U.S. 70, 77[2] (1933), where the Supreme Court said:

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2. Plaintiffs claim that the *Louisiana* case does not support the Commission's procedures in its *Ex Parte* 259 case because the substantive standard of lawfulness in Section 15(a)(2) is changed from the standard that applied in the case before the court in Louisiana. In *Florida* v. *United States*, 292 US 1, 7-8 (1934), the Supreme Court noted that change and that the amendment emphasized the carriers' need for adequate revenues. The importance of the *Louisiana* case is the approval of the procedures followed by the ICC in general revenue cases, including the fact that the Commission does not make a final determination as to specific rates. The administrative problems are the same now as then, and the burden of proof is unchanged. See *The Interstate Commerce Commission*, Vol. 1, P. 58, by I.L. Sharfman, Commonwealth Fund, 1931.

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". . . in performing the duty broadly to increase carrier revenue, it is enough if the Commission in the first instance, makes such inquiry and investigation as would enable it to say that the prescribed increases when applied to members of the group will generally not exceed a reasonable maximum. The extent of this inquiry and the detail of investigation cannot be marked by this court with certainty."

See also *New England Divisions Case*, 261 U.S. 184, 197-198 (1923), where the court said:

"For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure.[17] This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, §12, 36 Stat. 539, 551, 552, to be upon the carrier.[18] Thus, the practice did not have its origin in the group system of rate-making provided for in 1920 by the new §15a. It was the actual necessities of procedure and administration which had led to the adoption of that method; in passing upon the reasonableness of proposed rate increases . . ." (261 U.S. at pp. 197-198) [footnotes omitted]

Bringing themselves at last to a discussion of *Algoma, Koppers* and *Florida Citrus,* plaintiffs argue that those cases "are not relevant here because they challenge the *rates* put into effect, not the *constitutionality* of the Commission's methods of arriving at its order." (Memo P. 26)

Apparently plaintiffs recognize that those cases bar review of the Commission's order insofar as it permits the filing of tariffs publishing increases in the individual rates in which plaintiffs are interested. Plaintiffs are interested solely in rates on coal to their electric generating stations. They do not dispute the fact that the railroads are, as found by the Commission, in urgent need of increased revenue. The raising of a "constitutional" procedural issue in respect to the Commission's order is sufficient to avoid the clear thrust of the *Algoma, Koppers* and *Florida Citrus* cases. Contrary to plaintiffs' argument, the *Algoma* case was not limited solely to a challenge to the "rates put into effect." There the court in summarizing the contentions of the coal shippers who sought to avoid the increases on coal rates said:

> "The plaintiffs' contention, as to the alleged invalidity of the order, is in substance that the conclusion of the Commission that the increased rates 'will not be in excess of just and reasonable rates for a period to terminate June 30, 1936' is not itself a finding of fact (but merely a conclusion) and is based only on the finding of fact as to the financial needs of the carriers which is not legally sufficient to justify the conclusion, and therefore the action of the Commission in entering the orders was arbitrary and without warrant in law . . ." (11 F.Supp. at P. 492)

Note that the allegations in *Algoma* broadly attacked the legal sufficiency of the Commission order in its entirety, and there, as here, the complaint was one to enjoin and set aside the Commission order in its entirety. Of course, there, as here, the plaintiffs' real interest was in specific rates on coal. Plaintiffs have not distinguished this case from *Algoma*, *Koppers* and *Florida Citrus*.

Moreover, even if *Algoma* had involved only a challenge to specific "rates put into effect," the rationale of the *Algoma* case would apply here. To the extent the order permits increased rates in which plaintiffs have no interest, they are not affected thereby. The Commission did not adjudicate upon the specific coal rates used by the plaintiffs (or upon specific rates used by anyone else) and, to the extent that those coal rates might exceed a maximum just and reasonable level because of the increase or for any other reason, the plaintiffs have a remedy under Sections 13 and 15 of the Act, an administrative remedy which they have not exhausted. And, as was true in *Algoma*, these plaintiffs cannot "show an invasion . . . of some independent legal right whereby they particularly are subject to injury." (11 F.Supp. at P. 496)

In their discussion of whether or not the Commission order is reviewable plaintiffs discuss the permissive nature of the Commission orders (Memo PP. 26-27) and exhaustion of administrative remedies (Memo P. 28). Those points are more fully developed by the intervening plaintiffs and are answered *infra* in reply thereto.

II.

Reply to Arguments of Intervenor-Plaintiffs.

A. Preliminary Analysis.

The intervenor-plaintiffs recognize that the sole issue on the motion before the court is whether or not the Commission order is reviewable. Aside from making what has been characterized as a "distinction without difference," their response to the *Algoma, Koppers* and *Florida Citrus* cases, the principal cases relied on by the Commission and railroads here, is to state the *Algoma* and *Koppers* are wrong and that *Florida Citrus,* in which the court characterized the *Algoma* and *Koppers* cases as stating the "law of the land," is correct. (Memo P. 7) Because intervening plaintiffs concede that the *Florida Citrus* decision is correct, the court's attention is directed to what was said there in dismissing a complaint against a Commission order permitting nationwide increases in refrigeration charges. There the court said:

> "As in the *Algoma* case, the Commission's order is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided." (144 F.Supp. at p. 523)
>
> "On the theory that we have under review a rate case rather than a revenue case, the plaintiffs assert they will have no opportunity for redress from the discriminatory effects of the increases in the charges as applied to specific situations unless we set aside the Commission's order. But, it appears, the plaintiffs in this case as in *Algoma Coal & Coke Co. v. United States, supra,* and in *Koppers Company* v. *United States,* D.C.W.D. Pa. 1955, 132 F.Supp. 159,

161, have mistaken their remedy." (144 F.Supp. at PP. 525-526)

"It has been settled that the Interstate Commerce Commission is without power to award reparations with respect to shipments which moved under rates approved or prescribed by it. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 52 S. Ct. 183, 76 L. Ed. 348. Cf. *Atlantic Coast Line Railroad Co.* v. *State of Florida*, 295 U.S. 301, 55 S. Ct. 713, 79 L. Ed. 1451. But this rule has no application under the permissive provisions of an order in a general revenue case such as is this case. Supported by substantial authority it was held in the *Algoma* case [11 F.Supp. 496] 'If the increased rates, as applied to the plaintiffs' particular situation can be shown to be unjust and unreasonable, their remedy is clearly by proceedings under sections 13 and 15 of the act (49 U.S.C.A. §§13, 15) for individual relief, and for reparation orders under section 16(1) of the act (49 U.S.C.A. §16(1)). [Citing cases.] Nothing in the Commission case debars them from such relief.' This, we think, as expressed by the Secretary of Agriculture, is the law of the land, and it is applicable to the instant case." (144 F.Supp. at P. 527)

Intervening plaintiffs' characterization of *Algoma* as "wrong" is contrary to the 1966 opinion of the Court of Appeals in *Public Utilities Comm. of State of Cal.* v. *United States, supra.*

B. The Procedural Distinction Made by Intervening Plaintiffs Is without Significance.

Intervening plaintiffs suggest that the procedures before the Commission which resulted in the orders which were held non-reviewable in *Algoma, Koppers* and *Florida Citrus* were different from the procedures followed in the *Ex. Parte 259* case, which resulted in the Commission's orders involved here. The procedural difference is solely that the Commission determinations in *Ex. Parte 259* were made in an investigation entered into after suspension of the railroad-initiated rates, while the order in the *Ex. Parte 145* proceedings which were before the court in *Algoma* was made after an investigation conducted on a petition in respect to the railroad-initiated rates. It is not a distinction of substance which should cause a different legal result to obtain. The findings made by the Commission in the case that was before the court in *Algoma* are similar to the finding made by the Commission here, the lawfulness of individual rates was not determined there or here, and the availability of remedies under Sections 13 and 15 were the same there as here. In fact, in *Algoma* the court saw no substantive difference between the petition procedure there and the investigation procedure followed here. The court said:

> ". . . It is true that ordinarily rate changes are initiated by the carrier by the filing of new tariffs with the Commission before a hearing. But this order of procedure is not definitely required by the act, and there would seem to be no reasonable objection to the procedure actually adopted here in view of the quite imperative emergency situation confronting the railroads." (11 F.Supp. at p. 493)

C. The Intervening Plaintiffs Misconstrue the Commission's Order.

The intervening plaintiffs at Memo P. 8 and P. 17 construe the Commission's order as having finally determined the lawfulness of the individual rates with which they are concerned. However, the Commission, as has been its custom in general revenue cases for more than thirty years, did not determine specific lawfulness of rates, but rather made its findings in respect to general bases of rates and charges. This is made clear from the Commission's finding No. 15 in the assailed order, which is quoted *supra* at Page 5. There the Commission specifically held that the rates and charges authorized were not prescribed and that they were subject to complaint and investigation. Intervening plaintiffs quote the Commission statement that:

> ". . . Except where specifically otherwise stated, we find the proposed increases just and reasonable." (332 ICC at P. 789-790)

Ignoring finding No. 15 in the report, they argue that there is a determination which prevents application of the opinions in *Algoma, Koppers* and *Florida Citrus*. However, that language is similar to that employed by the Commission in the orders under review in those cases, viz.:

Algoma

> ". . . we find that the present rates and charges, as increased by the emergency charges here authorized will not be in excess of just and reasonable rates . . ." (*Ex Parte 115, Emergency Freight Charges, 1935*, 208 ICC 4, at P. 60)

Koppers

". . . we conclude that we should now authorize further increases in rates and charges beyond those previously authorized . . . all basic freight rates and charges of petitioning railroads . . . may be justly and reasonably increased 15 percent." *(Ex Parte 175, Increased Freight Rates, 1951,* 284 ICC 575, at PP. 660, 661)

Florida Citrus

"We further conclude that . . . the basic refrigeration charges may be increased as herein specified and that the charges so increased will be just and reasonable for the future." *(Proposed Increased Refrigeration Charges,* 297 ICC 505, at P. 554)

The intervening plaintiffs have fallen into the same error here as did plaintiffs in the *Algoma* case. There the court, referring to similar argument, said:

"The position taken by the plaintiffs seems to misconceive the real nature and effect of the Commission proceeding. They take the view that what the Commission did in effect was to determine what would be just and reasonable rates for particular traffic transported by particular railroads, on insufficient findings of fact . . ." (11 F. Supp. at P. 493)

The above statement was quoted with approval in *Public Utilities Comm. of State of Cal.* v. *United States, supra,* at P. 239-240, where the court held that an FPC opinion and order which dealt with telephone company tariffs was not reviewable.

This misconception of the Commission's order is then relied upon by intervening plaintiffs in making arguments in respect to exhaustion of administrative remedies and in respect to the reviewability of orders under Section 15(7) of the Act.

D. The Commission and Railroads Have Not Contended that All Commission Orders Entered after Investigations under the Provisions of Section 15(7) Are Non-Reviewable.

The intervening plaintiffs argue that all Commission orders entered in proceedings under Section 15(7) are subject to jurisdictional review, and in support of that proposition quote from a memorandum to the U. S. Supreme Court filed by the Interstate Commerce Commission. (Memo. P. 9) The Commission and railroads have not in this case contended that all orders are non-reviewable. However, for rate orders under Section 15(7) to be reviewable those orders must make a specific final determination of the reasonableness of the specific rates involved and in which plaintiffs have a direct interest. Here there has been no determination by the Commission of the lawfulness or reasonableness of any individual rate. There has merely been a determination in respect to general bases of rates and charges in a general revenue proceeding with the specific statement that the rates are not prescribed and that their lawfulness is open for review and proceedings brought under Sections 13 or 15 of the Interstate Commerce Act.

In *United States* v. *Louisiana, supra,* the Supreme Court specifically approved the Commission's practice of making only general determinations as to broad groups of rates in dealing with general revenue cases and, of course, it is the fact that the Commission must deal generally with the

rate structure in a revenue case that precludes a need for specific findings as to the lawfulness or reasonableness of individual rates. This is one of the distinctions which makes the order in this case not subject to review, while orders in other rate cases conducted under Section 15(7) may be reviewable.

E. It is Not Contended That All Permissive Orders Are Non-Reviewable.

The Commission and Railroads have not contended that the permissive character of the order in and of itself makes the Commission order non-reviewable. Intervening plaintiffs argue that permissive orders of the Commission entered after full hearing are reviewable, but they also concede that "some 'permissive' decisions of the Commission are admittedly non-reviewable." (Memo P. 10) The railroads do not contend that such permissive orders as those which authorized the merger of two or more railroads are not subject to judicial review. Those orders represent essential prior Commission action and not, as here, merely the decision of the Commission not to interfere with carrier action, which interested shippers and receivers of freight may call into question in a proceeding under Sections 13 and 15. In the present case the essential significance of "permissiveness" is indicated by the following quotation from *Algoma* (11 F.Supp. at P. 493):

> "The result of the Commission proceedings, therefore, was merely to permit the railroads to initiate new rates."

At page 494:

> "[The Commission] *prescribed* no particular rates. It merely permitted the carriers to file new

> rates without suspension. It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under section 13. (49 USCA §13) That is to say, the increased rates now complained of are *carrier-made* rates and not *Commission* made rates." (emphasis by the Court)

The order here under review, therefore, is essentially different from those cited by the intervening plaintiffs as being permissive orders. This order, which made no determination as to any specific rate and which provided for subsequent consideration of the carrier-made rates in which intervening plaintiffs are interested, is non-reviewable.

F. The Plaintiffs Have Not Availed Themselves of the Procedures for Determination of the Lawfulness of the Rates in Which They Are Interested.

Plaintiffs and intervening plaintiffs argue that they are without remedies other than here. Plaintiffs have not exhausted their administrative remedies. They have ample remedies against any rate unlawfulness in which they have an interest. As stated in the Commission order, they can have a full and complete determination of the lawfulness of those rates. In such proceedings, the Commission can fix their rates for the future and, pursuant to Section 8 of the Act, can award damages in connection with past shipments.

That procedure was approved as a reasonable solution to the administrative problem in *United States* v. *Louisiana*, and *New England Divisions Case, supra.* If that procedure were not followed, inequitable and possibly

drastic injury to the adequacy of the nation's transportation system could result. For example, a shipper interested only in a few specific rates would be able to deny the railroads millions. Here the increased rates will produce approximately $466 million annually (332 ICC at P. 602) and these amounts were found by the Commission to be necessary to meet the railroads' critical need for increased revenue to offset in part increased operating costs (332 ICC at P. 790). These practical considerations led the court in *Koppers* to state that:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement." (132 F. Supp. at p. 163)

Intervening plaintiffs' objection to proceeding under Sections 13 and 15 is no reason for modifying the court-approved procedures Congress provided in those sections. Their speculation that such proceedings would be "fruitless" (Memo p. 13) or as plaintiffs suggest "hollow" (Memo p. 25) is unfair. There are numerous cases in which the Commission in Section 13 proceedings has granted relief in respect to specific rates—both as to the future and as to damages in the past—after such rates had been increased subsequent to a general revenue proceeding. See, e.g., *State Corp. Comm. of Va.* v. *Norfolk & W. Ry. Co.*, 190 I.C.C. 325, 344-345 (1932); *William Kelly Milling Co.* v. *Atchison, T. & S. F. Ry. Co.*, 211 I.C.C. 53, 56 (1935); and *Marshall Field & Co.* v. *Chesapeake & O. Ry. Co.*, 244 I.C.C. 789, 792 (1940).

Conclusion

The motion should be granted and the complaint dismissed.

Respectfully submitted,

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ORDER OF THE COURT

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

October 28, 1969

ATLANTIC CITY ELECTRIC COMPANY, ET AL., *v.* UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION ET AL.,	Three-judge Court No. 69 Civ. 800

McLEAN, District Judge.

Seven public utilities operating in the northeastern section of the United States brought this action to enjoin and set aside an order of the Interstate Commerce Commission made on January 9, 1969, in a proceeding entitled "Ex Parte 259, Increased Freight Rates, 1968." The order permitted the Class I railroads of the United States to put into effect a rate increase on a great number of commodities. Among the rate inreases so authorized was an increase of 5 per cent on bituminous steam coal, up to a maximum of 15¢ per ton. Plaintiffs are large users of bituminous steam coal and hence are adversely affected by the order. They claim that the order is unlawful and that the procedures employed by the Commission have deprived them of due process of law.

The State of New York and the Departments of Agriculture of ten other northeastern states have been permitted to intervene as parties plaintiff. They complain of the increase of 6 per cent authorized by the order in freight rates on grain, feed and feed ingredients moving into the northeastern states.

Many Class I railroads have also been permitted to intervene. They support the Commission's order.

The Commission has moved under Rule 12(b) (6) to dismiss the action on the ground that plaintiffs and intervenor plaintiffs have failed to state a claim upon which relief can be granted. In essence, the Commission asserts that the attack upon its order is premature. Decision of this question requires analysis of the Commission's order and consideration of the remedies available to plaintiffs and intervenor plaintiffs under the Interstate Commerce Act. 49 U.S.C. § 1 *et seq.*

The various steps in the proceeding before the Commission which resulted in the order under attack are set forth in two reports of the Commission, an interim report dated November 25, 1968 (332 I.C.C. 590), and a final report dated January 9, 1969 (332 I.C.C. 714). They may be briefly summarized as follows.

On March 7, 1968, the Class I railroads filed with the Commission a petition for permission to publish increased freight rates. The Commission granted their request. On March 11, 1968, the railroads filed their master tariff X-259 containing schedules of proposed increases, to be effective on May 27, 1968. The effective date was later postponed to June 24, 1968. The proposed increases ranged generally from 3 to 10 per cent, depending upon the commodity involved. By order entered June 19, 1968, the Commission suspended until January 24, 1969 all increases in excess of 3 per cent. This order also directed that an investigation be made of the proposed increases.

The investigation was divided into a number of parts, designated as "subnumbers." "Sub-No. 2" was concerned with "railroad cost and revenue need." Other sub-numbers pertained to the increases requested on particular commodities. Sub-No. 3 was concerned with coal; Sub-No. 5 with grain. Hearings were held before hearing examiners.

Plaintiffs and intervenor plaintiffs appeared and protested the proposed increases.

The Commission's interim report dated November 25, 1968 was devoted to the need of the railroads for increased revenue, *i.e.*, Sub-No. 2 of the proceeding. The Commission concluded that "the proposed rate level, generally speaking, is within the zone of reasonableness." 332 I.C.C. at 608. The Commission went on to find that "the increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates of and charges." 332 I.C.C. 609.

It further found:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in Arizona Grocery Co. *v.* Atchison, T. & S. F. Ry. Co., 284 U.S. 370 [52 S. Ct. 183, 76 L. Ed. 348], and will, in all respects, be subject to complaint and investigation as provided by the act." 332 I.C.C. 609.

By order dated November 25, 1968, the Commission vacated its suspension order of June 19, 1968 and permitted the full increases proposed by the railroads to take effect, except as to certain commodities, one of which was grain. As to these, the suspension order was continued.

At the beginning of its final report dated January 9, 1969, the Commission referred to its interim report of November 25, 1968, and stated that the proceeding had been continued thereafter "for the consideration of the lawfulness of the proposed and interim increases as they applied to specific commodities and services, and of the evidence and arguments of all parties with respect thereto." 332 I.C.C. 714. The Commission then remarked:

> "Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount, nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed." 332 I.C.C. 715.

The Commission went on to say:

> "We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in Arizona Grocery Co. *v.* Atchison, T. & S. F. Ry. Co., 284 U.S. 370 [52 S. Ct. 183, 76 L. Ed. 348]." 332 I.C.C. 715.

The report then discussed at length the contentions of the parties with respect to proposed increases for various commodities or groups of commodities. With respect to a few of them, not including coal or grain or feed moving to the northeast, the Commission denied the full increases requested by the railroads. As to the others, the railroads' request was approved. As far as material here, the Com-

mission's ultimate conclusions and findings were: (1) there is a critical need on the part of the railroads for additional revenue to offset, in part, increased operating costs; (2) the basic freight rates may be increased generally in accordance with master tariff X-259; (3) the increased freight rates will not exceed "a maximum reasonable level"; (4) "Our findings as to justness and reasonableness . . . will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction." 332 I.C.C. 792.

The Commission's order dated January 9, 1969, based upon this report, provided, in a somewhat backhanded fashion, that the railroads were directed to cease and desist from collecting basic rates "increased to a greater extent than found just and reasonable herein . . ." 332 I.C.C. 793.

It is apparent from this recital that the proceeding before the Commission was a general revenue proceeding. The Commission was concerned primarily with the "need, in the public interest, of adequate and efficient railway transportation service" and with the railroads' "need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." 49 U.S.C. §15a(2). The increases in rates were general, even though the percentage of increase varied from commodity to commodity. The new rates were "carrier-made," that is to say, the Commission merely authorized the railroads to put the increases into effect, it did not require or prescribe them. It is true that the Commission found these general increases, on an overall basis, to be just and reasonable. But the Commission did not purport to pass upon individual rates as contrasted

with the general level. It neither prescribed nor specifically authorized a particular rate on a particular commodity, say coal or grain, from a specific point of origin to a specific destination.

[1] If plaintiffs wish to complain of the reasonableness of a particular rate on the coal that is transported to them from a particular point of origin, they have the right to apply to the Commission under 49 U.S.C. §§13 and 15 to prescribe a different rate. The intervenor plaintiffs have the same right as to the rates on grain and feed with which they are concerned. This is what the Commission referred to in stating that its findings would not preclude interested parties from bringing any maladjustments to the Commission's attention. Neither plaintiffs nor intervenor plaintiffs have instituted such a proceeding. The nub of the present controversy is whether or not they must do so before seeking review of the Commission's general revenue increase order.

The Commission argues that plaintiffs and intervenor plaintiffs are attacking the rates on coal and grain respectively, and that this court should not hear them at this time. The Commission contends that the two sets of plaintiffs must first exhaust their remedies under Section 13. If they do, it may turn out that the Commission will heed their protests and will adjust the rates which directly affect them. In that event, their complaint will be satisfied and there will be no need to consider the propriety of the general increase order. Plaintiffs and intervenor plaintiffs, on the contrary, say that in this action they are not attacking the rates on coal and grain as such. They say that they are complaining of the entire order, on the ground, to put it simply, that the Commission acted illegally in making it. They contend that this court should hear them now, without

putting them to the trouble and expense of making an application to the Commission under Section 13, an application which may prove to be futile.

It is true that on the face of the complaint, plaintiffs do challenge the entire order and the Commission's conduct of the entire proceeding, not merely the part of it which relates to coal. Although the complaint does not allege that the Commission erred in finding that the railroads need increased revenues, it does assert that the Commission acted "without evidence in the record as to the justness and reasonableness of such rates." It alleges a number of respects in which the Commission acted improperly, *i.e.*, in not making its Bureau of Accounts a party to the proceeding, in failing to order its examiners to make preliminary decisions, in failing to afford plaintiffs an opportunity to propose findings and conclusions, in failing to require the railroads to submit evidence of cost, in making findings on the basis of unsupported opinion, et cetera.

The intervenors' complaint alleges that the Commission "erred" and "acted arbitrarily, capriciously and abused its discretion" in a variety of ways. For example, the complaint asserts that the Commission rejected evidence that traffic subjected to higher percentage increases was presently bearing a disproportionate contribution to rail revenues, that the Commission refused to consider plaintiffs' cost study, that its findings in various respects were contradicted by the evidence, that it refused to give any weight to economic conditions and trends in northeastern agriculture, et cetera.

The Commisssion's motion to dismiss is based upon the face of the complaints. It necessarily admits for the purposes of this motion the truth of their allegations, in so far

as those allegations are statements of fact rather than legal conclusions. Thus, although the Commission does not admit that it erred or that it acted illegally, arbitrarily or capriciously, it does admit that it did not take the procedural steps which plaintiffs say it should have taken, that it rejected proferred evidence which plaintiffs deemed relevant, and the like. Nevertheless, the question remains whether this court at this time should undertake to pass upon these matters and decide the merits of plaintiffs' claims.

[2] It is clear that the general revenue order which the Commission made here was within its powers under 49 U.S.C. § 15a(2), in view of the impracticability of dealing with specific rates in a proceeding in which hundreds of commodities were involved. United States *v.* Louisiana, 290 U.S. 70, 54 S. Ct. 28, 78 L. Ed. 181 (1933); King *v.* United States, 344 U.S. 254, 73 S. Ct. 259, 97 L. Ed. 301 (1952).

As to the reviewability of the order, the Commission and the intervenor railroads rely primarily upon three decisions: Algoma Coal & Coke Co. *v.* United States, 11 F. Supp. 487 (E.D. Va. 1935); Koppers Co. *v.* United States, 132 F.Supp. 159 (W.D. Pa. 1955); Florida Citrus Commission *v.* United States, 144 F.Supp. 517 (N.D. Fla. 1956), aff'd, 352 U.S. 1021, 77 S. Ct. 589, 1 L. Ed. 2d 595 (1957). *See also,* Birmingham Slag Co. *v.* United States, 11 F. Supp. 486 (N.D. Ala. 1935).

These cases support the Commission's position here. They held in substance that the court will not entertain a suit to enjoin an order of the Commission in a general revenue proceeding when plaintiffs have not exhausted the remedy afforded them by Section 13 to seek an adjustment of the particular rates which affect them. The dis-

tinctions which the present plaintiffs attempt to draw between those cases and this one do not seem to us to be substantial or significant. The fundamental principle is the same. As the court said in *Koppers*:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15 has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits." 132 F.Supp. at 163.

It may be that in some of the cases cited plaintiffs aimed their attack more directly at the rates authorized by the general revenue order than do the present plaintiffs and intervenors. But the fact remains that in this case as in the others plaintiffs' real concern is with the increased rates which the order authorized on the commodities in which they are interested. If the Commission had not approved a general increase on coal and grain and feed, plaintiffs and intervenors would not be here complaining of the procedures followed by the Commission.

[3] And it is as true in this case as in the others that by pursuing their remedy in a Section 13 proceeding, plaintiffs and intervenors may achieve the relief that they are really seeking, *i.e.*, a reduction in the particular rates on coal and

grain and feed. This court cannot assume that the Commission will deny them relief nor can it relieve them from the necessity of seeking it because to do so may be time-consuming and expensive. In our opinion, this is what the statutory scheme requires. Until this step has been taken, plaintiffs have not suffered any real injury. Only if and when their application under Section 13 is rejected will the Commission's action be ripe for judicial review.

We have carefully considered plaintiffs' argument that it is unjust to deny them a review of the Commission's general revenue order at this time because this is their only opportunity to have it reviewed. They maintain that in a subsequent Section 13 specific rate proceeding, the Commission will not consider their objections to the procedures followed in the prior general revenue proceeding and hence that they will be forever foreclosed from obtaining a judicial determination of the merits of the claims which they now assert. By way of justification of their fears, they cite Koppers Co. *v.* Chesapeake & Ohio Ry., 303 I.C.C. 383 (1958), a proceeding before the Commission subsequent to the court's refusal to review the Commission's general revenue order in Koppers Co. *v.* United States, 132 F.Supp. 159 (W.D. Pa. 1955), previously discussed. In the course of its opinion, the Commission said, with reference to the prior general revenue order:

> "Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." 303 I.C.C. 387.

Order of the Court

[4] We do not attempt, of course, to pass upon the propriety of this ruling of the Commission in the *Koppers* case. It is enough to say that in the case before us, we believe that plaintiffs' fears, however natural they may be under the circumstances, are unfounded. The general revenue order authorizing the overall increases is a necessary foundation or starting point for any subsequent determination of rates specifically applicable to plaintiffs. We see no reason why, upon making a proper record before the Commission in a Section 13 proceeding, plaintiffs cannot preserve the objections which they now assert to the procedure leading up to the general revenue order. We believe that an adverse ruling of the Commission on these objections should be reviewable by a court upon its review of the Commission's final order in the Section 13 proceeding. Although independent research by the court on this subject has revealed no decision directly in point, it is our view that an analogy may be found in cases involving the review of the Commission's order under Section 13(4) with regard to intrastate rates in which criticisms of a prior general order involving interstate rates were considered by the court. *See e.g.*, Illinois Commerce Commission *v.* United States, 292 U.S. 474, 54 S. Ct. 783, 78 L. Ed. 1371 (1934); North Carolina *v.* United States, 325 U.S. 507, 65 S. Ct. 1260, 89 L. Ed. 1760 (1945); Tennessee *v.* United States, 113 F.Supp. 634 (M.D. Tenn. 1953), aff'd, 346 U.S. 891, 74 S. Ct. 222, 98 L. Ed. 394 (1953). In any event, we are satisfied, for the reasons previously mentioned, that the statute does not contemplate an attack upon the general revenue order at this stage.

Order of the Court

The Commission's motion is granted. The action is dismissed for failure to state a claim.

So ordered.

Dated: October 28, 1969

s/ IRVING R. KAUFMAN

U.S.C.J.

s/ DUDLEY B. BONSAL

U.S.D.J.

s/ EDWARD C. MCLEAN

U.S.D.J.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Notice is hereby given that Atlantic City Electric Corporation, Niagara Mohawk Power Corporation, Public Service Electric and Gas Company and Rochester Gas and Electric Corporation, four of the above named plaintiffs, the State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts, ten of the above named intervening plaintiffs, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on October 28, 1969.

This appeal is taken pursuant to 28 U.S.C. 1253.

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Notice of Appeal to the
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Dated: December 18, 1969

ORDER NOTING PROBABLE JURISDICTION

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1083, October Term, 1969

ATLANTIC CITY ELECTRIC COMPANY, et al.,

Appellants,

v.

UNITED STATES, et al.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated with No. 1283 and a total of one and one half hours is allotted for oral argument.

May 18, 1970

Mr. Justice Douglas took no part in the consideration or decision of this order.

[*The next page is 169a*]

Part B

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

No. 1283

ALABAMA POWER COMPANY, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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* References are to Item Nos. in Docket No. 1283.

Chronological List of Relevant Docket Entries

November 27, 1968—Complaint filed

February 3, 1969—Order permitting Secretary of Agriculture to intervene as Party Plaintiff

February 12, 1969—Amended and Supplemental Complaint Filed

March 10, 1969—Order permitting Aberdeen and Rockfish R.R. et al. to intervene as defendants

March 24, 1969—Amended and Supplemental Complaint of Secretary of Agriculture.

March 24, 1969—Answer of ICC to Amended and Supplemental Complaint

March 25, 1969—Answer of United States to Amended and Supplemental Complaint and Intervening Complaint

April 7, 1969—Answer of Aberdeen and Rockfish R.R. et al. to Amended and Supplemental Complaint of Secretary of Agriculture

April 7, 1969—Answer of ICC to Amended and Supplemental Complaint of Secretary of Agriculture

August 18, 1969—Motion of Plaintiffs for Determination that Action be maintained as a class action

September 16, 1969—Memorandum of Defendant ICC and Intervening Defendants in Opposition to such Motion

November 10, 1969—Hearing before three-judge court

December 4, 1969—Memorandum Opinion of District Court (with dissenting opinion, Wright, J.)

December 19, 1969—Judgment

February 4, 1970—Notice of Appeal

[*The next page is 173a*]

Amended and Supplemental Complaint Seeking Review of Interstate Commerce Commission Orders

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action

No. 2970-68

ALABAMA POWER COMPANY, AMERICAN PAPER INSTITUTE, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS, GAS APPLIANCE MANUFACTURERS ASSOCIATION, INC., GEORGIA POWER COMPANY, GULF POWER COMPANY, MANUFACTURING CHEMISTS' ASSOCIATION, INC., PROPERTY OWNERS' COMMITTEE, SOUTHERN ELECTRIC GENERATING COMPANY, SOUTHERN PAPER MANUFACTURERS TRAFFIC CONFERENCE, STEEL SHIPPING CONTAINER INSTITUTE,

individually and as representatives of shippers as a class,

Plaintiffs,

[Addresses omitted in printing]

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Defendants.

I

This is an action to enjoin, annul and set aside orders of the Interstate Commerce Commission (herein called "Commission") dated November 25, 1968, 332 I.C.C. 590 and January 9, 1969, 332 I.C.C. 714, in a proceeding entitled *Ex Parte No. 259, Increased Freight Rates 1968*, true, correct and complete copies of which, together with

the accompanying reports, are attached hereto as Exhibits 1 and 2 respectively.

II

The jurisdiction of the Court is founded upon Sections 1336, 1398, 2284 and 2321-2325 of Title 28 of the United States Code Sections 701-706 of Title 5 of the United States Code and Rule 23, Federal Rules of Civil Procedure. The residence of the plaintiff Property Owners' Committee and the principal office of the plaintiff Manufacturing Chemists' Association, Inc., are in the District of Columbia.

III

The plaintiffs are as follows:

1. Alabama Power Company is a corporation organized and existing under the laws of the State of Alabama. It provides electric utility service throughout 56 of the 67 counties of the State of Alabama.

2. American Paper Institute is a corporation organized and existing under the laws of the State of Delaware. It is the national trade association of the pulp, paper and paperboard industry. Its membership of approximately 250 companies, representing in excess of 85 percent of the industry, operates 5,713 plants located in 48 states, engaged in the manufacture of pulp, paper, paperboard and paper products.

3. Association of Home Appliance Manufacturers is an unincorporated non-profit trade association of nearly all companies manufacturing home appliances in the United States. Its member companies manufacture and ship over 90 percent of the major home appliances in the United States, including room air conditioners, dehumidifiers,

dishwashers, disposers, home laundry appliances, portable appliances, ranges, refrigerators and freezers.

4. Gas Appliance Manufacturers Association, Inc. is a corporation organized and existing under the laws of the State of Illinois. It is a non-profit trade association of 650 manufacturing firms which produce 95 percent of all the residential, commercial and industrial gas appliances and equipment made in the United States, as well as equipment used in the production, transmission and distribution of natural gas.

5. Georgia Power Company is a corporation organized and existing under the laws of the State of Georgia. It provides electric utility service throughout 153 of the 159 counties of the State of Georgia.

6. Gulf Power Company is a corporation organized and existing under the laws of the State of Maine. It provides electric utility service to the Western Panhandle of Florida.

7. Manufacturing Chemists' Association, Inc. is a corporation organized and existing under the laws of the State of New York. It is a non-profit trade association of 186 United States and 14 Canadian company members representing more than 90 percent of the productive capacity of the basic industrial chemicals within these countries.

8. Property Owners' Committee is an unincorporated voluntary association of coal mine operators and land owners with properties located in southern West Virginia, Virginia and eastern Kentucky.

9. Southern Electric Generating Company is a corporation organized and existing under the laws of the State

of Alabama. It operates a steam electric generating station which supplies power to Alabama Power Company and Georgia Power Company.

10. Southern Paper Manufacturers Traffic Conference is an unincorporated association of 42 pulp and paper producers charged with responsibility for representing its members in traffic and transportation matters of general industry interest. The member companies of the Conference receive and ship a variety of commodities, notably pulpwood and wood chips and paper and paper products, in railroad service, to and from 79 plants located in the Southeast and Southwest.

11. Steel Shipping Container Institute is a corporation organized and existing under the laws of the State of New York. It is a trade association representing 32 companies producing steel drums and other shipping containers. Those 32 companies produce about 90 percent of the iron and steel shipping containers manufactured in the United States.

12. The principal offices of the foregoing plaintiffs are as listed in the caption.

IV

In addition to suing individually in their own behalf plaintiffs also sue in behalf of all shippers similarly situated. The class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of plaintiffs are typical of the claims of the class and plaintiffs will fairly and adequately protect the interests of the class. In addition, the prosecution of separate actions by individual members of the class would create a risk of (a) inconsistent or varying

adjudications with respect to individual members which would establish incompatible standards for the parties opposing the class and (b) adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication. Moreover, the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

V

The United States of America is named as party defendant pursuant to the provision of Section 2322 of Title 28 of the United States Code. The Commission is named as a defendant because of its interest in defending its orders.

VI

On March 11, 1968 the railroads of the United States filed a tariff entitled "Tariff of Increased Rates and Charges X-259". By order entered June 19, 1968 the increases in rates and charges were suspended to the extent that they exceeded 3 percent and an investigation was ordered. By order of July 3, 1968 the Commission divided the investigation into 10 sub-proceedings—Sub-No. 2, railroad cost and revenue needs and Sub-Nos. 3-11 relating to specific commodities. The report and order of November 25, 1968 is a final report and order disposing of the Sub-No. 2 proceeding. It finds on the entire record, including evidence and briefs, that the general level of rates increased as proposed by the railroads in their X-259 Tariff of Increased Rates and Charges does not exceed a just and reasonable level, reserving for correction in a

later report and order maladjustments as between specific rates but only within the framework of the general bases of rates and charges approved in the report.

VII

The Commission's report and order of January 9, 1969, after reciting that the November 25, 1968 report and order had continued the proceeding for consideration of the lawfulness of the increases "as they applied to specific commodities and services" stated that:

> Our findings as to increased railroad operating costs and revenue need, as set forth and explained therein, are adopted and made part of this report as though fully restated. . .

The only other reference to revenue needs is contained in some broad generalized language in the "Ultimate Conclusions and Findings". Otherwise, the entire report is devoted to a consideration of how the higher level of revenues authorized in the earlier report should be allocated among the various commodities and services. With a few exceptions of no relevance to the issues in this proceeding it authorized the increases as proposed by the railroads.

VIII

The plaintiffs in this action participated as protestants in the proceeding before the Commission through the submission of evidence, briefs and argument. They are either shippers or representatives of shippers who are bearing over 20 percent of the total increases approved by the Commission in *Ex Parte No. 259*.

IX

The Commission's report and order of November 25, 1968 is arbitrary, capricious, without rational basis, an abuse of discretion and otherwise unlawful.

X

The following findings in the report and order of November 25, 1968 are not supported by the requisite subsidiary findings:

1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges, with the exceptions noted in our order, are permitted to become effective at this time.

2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

3. The increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges. This finding,

however is without prejudice to other or different findings to be reached in Sub-Nos. 3-11 in regard to particular rates and charges.

The unnumbered finding that use of 1966 as a base year is "reasonable and fair to shippers".

The unnumbered finding that the railroads' rates of return for the years 1966, 1967, 1968 and for the "constructive year" (Estimated 1968 traffic with last half 1968 expenses annualized) "are clearly inadequate".

XI

The findings referred to in the foregoing paragraph are not supported by substantial probative evidence.

XII

The report and order of November 25, 1968 is also erroneous in the following respects:

(1) It holds erroneously that there is a zone of reasonableness applicable to a general proposed rate level as opposed to the level of specific rates.

(2) It does not make the finding required by the statute that with the additional revenue to be derived from the increased freight rates and charges, the proposed level will provide adequate and efficient railway transportation services at the "lowest level consistent with the furnishing of such service" as required by Section 15a(2) of Title 49 of the United States Code. The record before the Commission will not support such a finding.

(3) It holds erroneously that rate of return is a standard which can properly be applied as a test of the ade-

quacy of respondents' revenues and bases its order in part on findings that the railroads' rates of return for the years 1966, 1967, 1968 and for the "constructive year" are "clearly inadequate".

(4) It fails to give consideration to evidence of disparate financial prospects and revenue needs among the several carriers and carrier groups.

(5) It makes no findings which would provide a basis for ignoring demonstrated differences and treating all railroads and groups of railroads as having like revenue needs.

XIII

The Commission's report and order of January 9, 1969 is arbitrary, capricious, without rational basis, an abuse of discretion and otherwise unlawful.

XIV

The following findings in the report and order of January 9, 1969 are supported neither by the requisite subsidiary findings nor by substantial evidence:

> 1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges, subject to the limitations and exceptions set forth below, are permitted to be continued or to be put into effect.

2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

3. Respondents may justly and reasonably be permitted to continue and to establish the increased interstate freight rates and charges approved in our interim report . . . [with certain exceptions not relevant to the issue raised by this Amended and Supplemental Complaint]

* * *

13. The increased freight rates and charges authorized herein will not exceed a maximum reasonable level, and the revenues derived therefrom will result in earnings and rates of return for the railways, as a whole and by the usual groupings, not in excess of that required to enable them to render adequate and efficient transportation at the lowest cost consistent with the furnishing of such service.

XV

The Commission erred in its January 9, 1969 report and order in adopting the findings in the November 25, 1968 report and order "as to increased railroad operating costs and revenue need, as set forth and explained therein".

XVI

The Commission erred in its finding 13 in its January 9, 1969 report and order in using rate of return as a test of whether rates exceed a maximum reasonable level.

XVII

The Commission erred in its November 25, 1968 and January 9, 1969 reports and orders in failing and refusing to require the railroads to present evidence of, and to consider evidence presented by others of, the unit costs of performing transportation services.

XVIII

Unless the relief prayed for herein is granted, plaintiffs will suffer irreparable injury and damage.

WHEREFORE plaintiffs demand

(1) That a three-judge court be convened pursuant to the provisions of Section 2284(1) of Title 28 of the United States Code.

(2) That after hearing before such court judgment be entered enjoining, annulling and setting aside the complaint of Commission order.

(3) That plaintiffs be granted such other and further relief in the premises as justice may require.

Respectfully submitted

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GEORGIA POWER COMPANY
GULF POWER COMPANY
SOUTHERN ELECTRIC GENERATING COMPANY

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PROPERTY OWNERS' COMMITTEE

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AMERICAN PAPER INSTITUTE

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Amended Complaint

Southern Paper Manufacturers'
Traffic Conference

J. Raymond Clark
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Association of Home Appliance
Manufacturers
Gas Appliance Manufacturers
Association, Inc.
Manufacturing Chemists'
Association, Inc.
Steel Shipping Container Institute

Richard J. Hardy
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Troutman, Sams, Schroder & Lockerman
Martin, Balch, Bingham, Hawthorne & Williams
La Roe, Winn & Moerman
Swidler & Berlnap

Of Counsel

Answer of Aberdeen and Rockfish Railroad Company, et al. Intervenors as Defendants

In The

UNITED STATES DISTRICT COURT

For the District of Columbia

[Title Omitted in Printing]

Intervenors as defendants, Aberdeen, and Rockfish Railroad Company, et al. (Exhibit A lists the names of all intervenors) in answer to the amended complaint:

I

Admit the allegations of paragraph I.

II

Admit the allegation of paragraph II that the residence of Property Owners' Committee and the principal office of the Manufacturing Chemists' Association, Inc., are in the District of Columbia and admit that jurisdiction of District Courts in suits to set aside some orders of the Interstate Commerce Commission is conferred by sections 1336, 1398, 2284 and 2321-2325 of Title 28 of the United States Code; but deny that the Court has jurisdiction over the permissive orders entered November 25, 1968, 332 ICC 590, and January 9, 1969, 332 ICC 714, in the proceeding entitled *Ex Parte No. 259, Increased Freight Rates 1968;* and deny that Sections 701-706 of Title 5 of the United States Code and Rule 23 of the Federal Rules of Civil Procedure apply here.

Railroads' Answer

III

Neither admit nor deny the allegations of paragraph III for the reason that intervenors as defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

IV

Deny each and every allegation of paragraph IV, the purported class not having been defined; there being no question of law and fact common to a class as some shippers took positions before the Interstate Commerce Commission in conflict with the position plaintiffs took before the Commission; the claims of plaintiffs not being typical of the claims of all shippers in the United States, including the shippers that participated before the Commission in *Ex Parte No. 259*; and the objective of plaintiffs in this suit being to deprive the railroads of urgently required revenues, which is contrary to the interest of some shippers who recognize the need of the railroads for additional revenues to provide an efficient transportation system. Intervenors as defendants also deny that there is a risk of inconsistent or varying adjudications, as no other suit has been filed against the Commission orders in *Ex Parte No. 259* and if another suit should be filed in another jurisdiction it is unlikely that the Statutory Three Judge Court in that case would proceed without regard to this case; and further deny that suits to set aside reviewable orders of the Interstate Commerce Commission, which must be brought pursuant to specific statutory authority, are the type of case in which Rule 23 is applicable or appropriate.

V

Admit the allegations of paragraph V.

VI

Admit that on March 11, 1968, the railroads of the United States filed a tariff entitled "Tariff of Increased Rates and Charges X-259" and admit that the Interstate Commerce Commission entered orders in *Ex Parte No. 259* on June 19, 1968; July 3, 1968; and November 25, 1968; but deny that those were the only orders entered in *Ex Parte No. 259;* and deny all other allegations of paragraph VI and refer the Court to the Commission's orders for a complete and accurate statement of their contents.

VII

Admit that the Interstate Commerce Commission entered an order on January 9, 1969; deny all other allegations in paragraph VII; and refer the Court to that Commission order (Amended Complaint, Exhibit 2) for a complete and accurate statement of its contents.

VIII

Admit that plaintiffs participated before the Interstate Commerce Commission in *Ex Parte No. 259;* neither admit nor deny all other allegations of paragraph VIII for the reason that intervenors as defendants are without knowledge or information sufficient to form a belief as to the truth of those allegations.

IX

Deny each and every allegation in paragraphs IX through XVII.

X

Deny the allegation of paragraph XVIII that plaintiffs will suffer irreparable injury and damage unless the orders of the Interstate Commerce Commission in *Ex Parte No. 259* are set aside for the reason that the Commission has clearly provided protection for the rights of all shippers, including plaintiffs, by its finding No. 5 in the order of November 25, 1968, to wit:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act."

and by its finding No. 15 in the order of January 9, 1969, to wit

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in

and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act."

and further deny that plaintiffs are entitled to any relief herein for the reason that they have not exercised the procedures available to them before the Interstate Commerce Commission.

XI

Except as expressly admitted herein, deny each and every allegation in the complaint and deny that the actions of the Interstate Commerce Commission are unlawful in any respect.

WHEREFORE, intervenors as defendants, Aberdeen and Rockfish Railroad Company, et al., pray that the complaint be dismissed with cost to the plaintiffs and pray that the relief sought be denied.

Respectfully submitted,

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Railroads' Answer

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Paul F. McArdle
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Tel. (202) 737-5900

[Certificate of Service and Exhibit A Omitted in Printing. For a List of Class I Railroads, See Exhibit A to the Railroads' Motion to Intervene, in Part A at P. 13a, Supra.]

Amended and Supplemental Complaint of Intervening Plaintiff, the U. S. Secretary of Agriculture

[Partial]

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

I

Intervening plaintiff, the Secretary of Agriculture of the United States, hereinafter referred to as the Secretary, brings this complaint to suspend, enjoin, annul and set aside the orders of the Interstate Commerce Commission, hereinafter referred to as the Commission, dated November 25, 1968 and January 9, 1969, in a proceeding entitled Ex Parte No. 259—*Increased Freight Rates, 1968.*

II

The Secretary was a party to the proceedings before the Commission out of which the present action arises.

III

The jurisdiction of the Court is founded upon 5 U.S.C. 701-706, sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U.S.C. 1336, 1398, 2284 and 2321-2325, and section 201 of the Agricultural Adjustment Act of 1938, 7 U.S.C. 1291.

IV

The United States of America is named as a statutory defendant pursuant to section 2322 of the Judicial Code, 28 U.S.C. 2322.

Complaint of Intervenor U. S. Secretary of Agriculture

V

The defendant Commission is an administrative tribunal created by section 11 of the Act to Regulate Commerce, approved February 4, 1887, 24 Stat. 379, 383, as amended and supplemented, 49 U.S.C. 11, with specifically vested powers and duties respecting interstate commerce under the said Act and the acts amendatory thereof and supplemental thereto, hereinafter referred to as the Interstate Commerce Act.

VI

The Commission proceeding grew out of a petition filed on March 7, 1968 on behalf of substantially all of the Class I railroads of the United States and others seeking the requisite relief from statutes and regulations administered by the Commission in order that the railroads might publish and, after expedited consideration by the Commission, put into effect, through the vehicle of a master tariff, selective increases in freight rates and charges ranging from three to ten percent. The railroads' petition was granted, over the formal objection of the Secretary, the following day, March 8, 1968.

VII

Pursuant to the authority thus granted, the railroads on March 11, 1968 published master tariff X-259 containing the proposed increases to become effective May 24, 1968. By order dated March 12, 1968, the Commission established the procedure to be followed in the initial stage of the proceeding. Provision was made for the filing of verified statements by the railroads and protestants

on an expedited basis. Oral argument was scheduled to begin on May 16, 1968.

VIII

By order dated April 15, 1968, the Commission revised the schedule established by its order of March 12, 1968, to afford protestants additional time in which to prepare and submit evidence in opposition to the rate increases proposed by the railroads. The railroads voluntarily postponed the effective date of the proposed rate increases until June 24, 1968 and oral argument was rescheduled and held on June 13 and 14, 1968.

IX

On June 19, 1968, the Commission ordered suspended to and including January 23, 1969, the tariff of increased rates and charges X-259. However, the railroads were authorized to establish rate increases of up to three percent subject to maximums no higher than specified in the suspended tariff. The Commission instituted an investigation into and concerning the lawfulness of all the rates, charges and regulations which were contained in the suspended tariff schedules as well as the tariff schedules authorized to be filed.

X

By order dated July 3, 1968 the Commission divided the case into ten sub-numbered proceedings. Pursuant to that order, additional verified statements were filed by both the railroads and protestants and statements theretofore filed were designated by the parties for consideration in the

appropriate sub-numbered proceedings. Hearings for the purpose of cross-examination and rebuttal in each of the proceedings, some of the hearings simultaneous, were held between September 9th and October 8th, 1968. Briefs in all proceedings were due November 12, 1968.

XI

Hearing in the sub-proceeding captioned Sub-No. 2—*Railroad Cost and Revenue Need* began September 9th and was closed September 25, 1968. On September 26, 1968, prior to the closing of hearing in other sub-numbered proceedings, the railroads petitioned the Commission to vacate suspension of master tariff X-259. Several parties, including the Secretary, replied to that petition on or before the due date of October 16, 1968. The Commission had taken no action on the railroad petition on November 12, 1968, when briefs in all sub-numbered proceedings were due. Counsel for the Secretary participated actively at every stage of the proceeding and filed a brief on November 12, 1968 addressed to the matter considered in five of the ten sub-numbered proceedings, including Sub-No. 2, *Railroad Cost and Revenue Need.*

XII

By order dated November 25, 1968, and served November 26, 1968, the Commission granted the aforesaid petition, vacated its order of June 19, 1968 and authorized the railroads to make the increased rates contained in all but two items in master tariff X-259 effective upon not less than one day's notice. The railroads were also authorized to depart from the provisions of section 4 of the Interstate

Commerce Act to the extent necessary to establish and maintain the authorized increases in rates and charges. Counsel for the Secretary appeared before the Honorable Howard F. Corcoran on November 27, 1968 and presented argument in support of plaintiffs' application for a temporary restraining order. That application was denied by Judge Corcoran's order herein, dated November 29, 1968.

XIII

By order dated January 9, 1969, and served January 23, 1969, the Commission adopted the findings as to increased railroad operating costs and revenue need set forth in its report of November 25, 1968, and disposed of the remaining issues of lawfulness of the increased rates and charges as applied to specific commodities and services. With a few exceptions, the order of January 9, 1969 left undisturbed the authority granted to the railroads on November 25, 1968 to make effective the increased rates and charges contained in master tariff X-259. The order of January 9, 1969 also granted the railroads relief from section 4 of the Interstate Commerce Act and from the Commission's tariff rules to permit the establishment of the authorized increases in rates and charges.

XIV

According to the most recent freight commodity statistics, published by the Commission's Bureau of Accounts, farm, food and kindred products accounted in 1967 for sixteen percent of the total tons of carload traffic originated by all Class I railroads in the United States and generated twenty-one percent of the total revenue derived

from such traffic by those railroads. All possible administrative remedies have been exhausted and there is no adequate remedy at law for the plaintiffs herein or for the producers and shippers of agricultural products throughout the United States whose interests will be adversely affected by the aforesaid decisions and orders of the Commission.

XV

The Commission's aforesaid reports and orders of November 25, 1968 and January 9, 1969 are unlawful and in violation of the Interstate Commerce Act, 49 U.S.C. 1 et seq., and 5 U.S.C. 551, et seq., (the former Administrative Procedure Act) insofar as they approved and permitted the selective rate increases contained in tariff X 259 to become effective and to continue in effect. The said reports and orders of the Commission approving the proposed increases and permitting them to become effective are based upon errors of law, are not supported by substantial evidence or adequate findings, exceed the statutory powers of the Commission, are arbitrary, capricious, an abuse of discretion, the product of improper procedures, lacking a rational basis, and are otherwise not in accordance with law. Specifically, and without limiting the generality of the foregoing, the Commission erred, *inter alia*, in the following respects:

1. The following findings are not supported by the requisite subsidiary findings or substantial evidence upon the record as a whole:

a. (t)here is a critical need on the part of the respondent railroads for additional revenue to off-

set, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. (332 I.C.C. at 608 and 790)

b. (t)he public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges . . . are permitted to become effective (332 I.C.C. at 608) and to be continued (332 I.C.C. at 790)

c. (w)ithout the additional revenue to be derived from the increased freight rates and charges authorized herein the earnings of respondents would be insufficient to enable them under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy. (332 I.C.C. at 609 and 790)

d. (t)he increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges. (332 I.C.C. at 609 and 792)

e. the revenues derived therefrom will result in earnings and rates of return for the railways, as a whole and by the usual groupings, not in excess of that required to enable them to render adequate and efficient transportation at the lowest cost and consistent with the furnishing of such service. (332 I.C.C. at 792)

f. the shipping public in general is reasonably protected by the automatic refund provision and the other remedial provisions of the act (332 I.C.C. at 609)

g. withholding of the authority would result in irreparable injury to respondents and would be contrary to the public interest (332 I.C.C. at 609)

h. the contemplated rate level would have no material adverse effect on the movement of traffic (332 I.C.C. at 608)

i. the rates of return of the railroads for 1966, 1967, 1968 and the constructive year are clearly inadequate (332 I.C.C. at 603)

j. the unit cost data computed by the railroads are substantially accurate (332 I.C.C. at 598)

k. the data concerning increased wage expenses adduced by the railroads are substantially accurate in all material respects (332 I.C.C. at 599)

l. use of 1966 as a base year is reasonable, and fair to shippers (332 I.C.C. at 599)

2. The Commission also erred in:

a. failing to find in its report of November 25, 1968 that the revenues generated by the increased rates and charges were required in order for the railroads to provide adequate and efficient railway transportation service *at the lowest cost consistent with the furnishing of such service* as required by

section 15a(2) of the Interstate Commerce Act, 49 U.S.C. 15a(2).

b. failing to find that the railroads did not sustain their statutory burden under section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), of proving the increased rates and charges just and reasonable.

c. failing to find that the railroads have established a special case and that the rates are reasonably compensatory as required by section 4(1) of the Interstate Commerce Act, 49 U.S.C. 4(1).

d. failing to adhere to the national transportation policy of the Congress, 49 U.S.C., note preceding section 1, to promote safe, adequate, economical, and efficient service and to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages.

e. adopting in its report of January 9, 1969 its findings as to increased railroad operating costs and revenue need, as set forth in its report of November 25, 1968. (332 I.C.C. at 714)

f. failing to analyze costs of providing the various services to which the increased rates and charges apply and thus failing to fairly and rationally apportion the burden of supplying railroad revenues among the nation's shippers.

g. failing to exclude from the record cost and other data sponsored by witnesses who had not

prepared the data and were unable to testify to its accuracy.

h. failing to require the railroads to adduce meaningful cost and revenue data against which to test their alleged need for increased revenue.

i. failing to require the railroads to meet the new standard of proof announced in its final report in Ex Parte No. 256, *Increased Freight Rates, 1967* of making "a more complete disclosure of the facts upon which they rely in support of the relief sought." (332 I.C.C. 280, 286)

j. failing to indicate the method and criteria used when it checked the unit cost data of the railroads and found them substantially accurate. (332 I.C.C. at 598)

k. failing to indicate the method and criteria used when it checked the railroads' wage data and found them substantially accurate in all material respects. (332 I.C.C. at 599)

l. relying upon the territorial and national average cost projections submitted by the railroads without analyzing these data.

m. excluding evidence offered by protestants reflecting acceptance of railroad stocks by the financial community.

n. denying the motion of the Secretary to make the Commission's Bureau of Accounts a party to the

proceeding for the purpose of assisting in developing the record in the public interest.

o. denying the Secretary's petitions for orders requiring the railroads to adduce data against which their cost and revenue projections and opinions as to effect of the increased rates upon the movement of traffic might be tested.

p. relying upon the rate of return as an indicator of the reasonableness of the increased rates and charges.

q. considering the question of railroad cost and revenue need entirely apart from the other factors which it is required to consider in determining the justness and reasonableness of the increased rates and charges.

r. holding simultaneous hearings upon the various aspects of the proceeding and thus denying protestants a fair opportunity to test the allegations of the railroad witnesses by cross-examination.

WHEREFORE, the Secretary, as intervening plaintiff prays:

1. That this Court suspend, enjoin, annul and set aside the reports and orders of the Commission complained of herein, and

2. That the Secretary be granted such other and further relief in the premises as justice may require and as may be deemed by this Court fit and proper.

Complaint of Intervenor U. S. Secretary of Agriculture

Respectfully submitted by direction of the Secretary of Agriculture of the United States.

HAROLD M. CARTER
Acting Assistant General Counsel

WILLIAM A. IMHOF
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Office of the General Counsel
United States Department of Agriculture
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Answer of the Interstate Commerce Commission

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

Defendant, the Interstate Commerce Commission, answers the amended and supplemental complaint as follows:

I.

Admits the allegations of Paragraph I.

II.

With respect to the allegations of Paragraph II, (1) admits that the residence of the plaintiff Property Owners' Committee and the principal office of the plaintiff Manufacturing Chemists' Association, Inc. are in the District of Columbia, (2) admits that Sections 1336, 2284, and 2321-2325 of Title 28 of the United States Code govern actions to set aside certain orders of the Commission and for the purposes of this action expressly waive the defense, suggested by *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495-6 (E.D. Va. 1935), that these sections do not confer jurisdiction over the permissive orders entered by the Commission on November 25, 1968, and January 9, 1969, in *Ex Parte 259, Increased Freight Rates, 1968*, and (3) denies that Sections 701-706 of Title 5 of the United States Code and Rule 23 of the Federal Rules of Civil Procedure apply to this proceeding.

I.C.C.'s Answer

III.

Admits the allegations of Paragraph III.

IV.

Denies the allegations of Paragraph IV.

V.

Admits the allegations of Paragraph V.

VI.

Admits the allegations of Paragraph VI except deny that the order of November 25, 1968, is a final order of the Commission and respectfully refer the Court to the Commission's orders for a true and complete statement of their contents.

VII.

With respect to the allegations of Paragraph VII, admits that the Commission entered a report on January 9, 1969, that referred to and adopted the report of November 25, 1968, but respectfully refer the Court to this order for a true and complete statement of its contents and otherwise deny the remaining allegations.

VIII.

With respect to the allegations of Paragraph VIII, admits that plaintiffs are shippers or representatives of shippers who participated in *Ex Parte 259* before the Commission as protestants but otherwise neither admits nor denies the remaining allegations for the reason that defendant lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

IX.

Denies the allegations of Paragraphs IX through XVII, inclusive.

X.

With respect to the allegations of Paragraph XVIII, denies that plaintiffs will suffer irreparable injury or damage if not granted the relief sought herein and further deny that plaintiffs are entitled to any relief since they have failed to exhaust the adequate remedies available to them before the Commission pursuant to 49 U.S.C. 13.

XI.

In further answer to the complaint, denies that the actions of the Commission here challenged are unlawful or improper for any reason whatever and aver that the Commission's actions were lawful and proper in all respects.

WHEREFORE, defendant, the Interstate Commerce Commission, prays that the complaint be dismissed and the relief sought be denied.

ARTHUR J. CERRA
Associate General Counsel

ROBERT W. GINNANE
General Counsel

PHILIP W. GWITS
Attorney
Interstate Commerce
Commission
Washington, D. C. 20423

Attorneys for the Interstate Commerce Commission

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Answer of the United States of America

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

The United States of America, a defendant in the above case, in answer to the amended and supplemented complaint and intervening complaint neither admits nor denies the allegations thereof. The United States of America neither supports nor opposes the order of the Commission.

JOHN H. D. WIGGER
Attorney
Department of Justice
Washington, D. C. 20330

RICHARD W. MCLAREN
Assistant Attorney General

DAVID G. BRESS
United States Attorney
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Washington, D. C. 20001

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Answer of Aberdeen and Rockfish Railroad Company, et al. Intervenors as Defendants, To Complaint of Intervening Plaintiff

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

Intervenors as defendants, Aberdeen and Rockfish Railroad Company, et al, in answer to supplemental and amended complaint of intervening plaintiff, The Department of Agriculture:

I

Admit the allegations of Paragraphs I and II.

II

Admit the allegation of Paragraph III that jurisdiction of District Courts in suits to set aside some orders of the Interstate Commerce Commission is conferred by Sections 1336, 1398, 2284 and 2231-2325, inclusive, of Title 28 of the United States Code, but deny that the court has jurisdiction over the permissive orders entered November 25, 1968, 332 ICC 590, and on January 9, 1969, 333 ICC 714, in the proceeding entitled *Ex Parte No. 259, Increased Freight Rates, 1968*, and deny each and every other allegation of Paragraph III.

Railroads' Answer to Intervenor's Complaint

III

Admit the allegations of Paragraphs IV through XII, inclusive, and respectfully refer this court to all orders and documents referred to therein for a complete and accurate statement of their contents and respectfully refer this court to the entire record before the Interstate Commerce Commission for a full and complete description of the Commission procedures in *Ex Parte No. 259.*

IV

Admit that the Interstate Commerce Commission entered an order on November 25, 1968, and respectfully refer this Court to that order for a complete and accurate statement of its contents, and deny each and every other allegation of Paragraph XIII.

V

Deny the allegations of Paragraphs XIV and XV and every sub-paragraph thereof.

VI

Except as expressly admitted herein, deny each and every allegation of the complaint and deny that the actions of the Interstate Commerce Commission are unlawful in any respect.

WHEREFORE, intervenors as defendants, Aberdeen and Rockfish Railroad Company, et al, pray that the complaint

be dismissed with cost to the plaintiffs and pray that the relief sought be denied.

Respectfully submitted,

EDWARD A. KAIER

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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Answer of the Interstate Commerce Commission to Amended and Supplemental Complaint of Intervening Plaintiff

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

Defendant, the Interstate Commerce Commission, answers the amended and supplemental complaint of intervening plaintiff, the Department of Agriculture, as follows:

I.

Admits the allegations of Paragraphs I and II.

II.

With respect to the allegations of Paragraph III, admits that 7 U.S.C. 1291 authorizes the Secretary of Agriculture to bring suits and that 28 U.S.C. 1336, 1398, 2284, 2321 to 2325 and 5 U.S.C. 703 govern actions to set aside certain orders of the Interstate Commerce Commission and for the purposes of this action expressly waives the defense, suggested by *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495-6 (E.D. Va. 1935), that these actions do not confer jurisdiction over the Commission's orders of November 25, 1968, and January 9, 1969, in *Ex Parte 259, Increased Freight Rates, 1968.*

III.

Admits the allegations of Paragraphs IV through XIII, inclusive, and respectfully refers this Court to all orders and other documents referred to therein for complete and accurate statement of their contents.

IV.

Admits that the Commission's Bureau of Accounts publishes certain freight commodity statistics but respectfully refers the Court to these publications for a complete and accurate statement of their contents; otherwise denies the allegations of Paragraph XIV.

V.

Denies the allegations of Paragraph XV and every subparagraph thereof.

VI.

In further answer to the amended and supplemental complaint, denies that the actions of the Commission here challenged are unlawful or improper for any reason whatever and aver that the Commission's actions were lawful and proper in all respects.

WHEREFORE, defendant, the Interstate Commerce Commission, prays that the relief sought be denied and the complaint be dismissed.

ROBERT W. GINNANE
General Counsel

ARTHUR J. CERRA (PWG)
Associate General Counsel

PHILIP W. GETTS
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Interstate Commerce Commission
Washington, D. C. 20423
Attorneys for the Interstate Commerce Commission

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Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ALABAMA POWER COMPANY, ET AL., *Plaintiffs*,
v.
UNITED STATES OF AMERICA, ET AL., *Defendants*.
Civil Action No. 2970-68

CORCORAN, *District Judge*: This action was instituted by several groups of shippers to enjoin, annul and set aside certain rate increase orders of the Interstate Commerce Commission entered November 26, 1968 and January 9, 1969 in *Ex Parte No. 259, Increased Freight Rates, 1968.*[1] These orders permitted Class I railroads of the United States to effect a general increase in their freight rates and charges to offset the increase in expenses which had occurred in the 1967-1968 period.

The Secretary of Agriculture intervened as a party plaintiff and several Class I railroads intervened as party defendants.

In substance the plaintiff shippers contend that the ultimate findings of the Commission as to the need for increased railroad revenue were not based upon adequate subsidiary findings and were not supported by substantial evidence on the record since the Commission failed to determine,

> "how much revenue the railroads would need: (1) for operating expenses, rents and taxes; (2) for capital improvements including (a) the revenues needed to pay for improvements to be financed by

1. 332 I.C.C. 714.

> internally generated funds, and (b) the additional revenues needed to enable them to obtain the funds required for externally financed improvements; and (3) the amounts needed for debt service and dividends. It should also have looked at and determined the railroads' future needs and not simply their present requirements:"[2]

The plaintiffs further contend that the Commission ignored the differences in the financial needs of the railroads in the three railroad districts and failed to require the railroads to present evidence of the unit cost of performing transportation services.

The intervening Secretary of Agriculture argued that the Commission did not hold the railroads to the recently announced new standard of proof which it had expressed in *Ex Parte No. 256, Increased Freight Rates, 1967*,[3] and further that the Commission did not consider the effect of the rate increases upon the movement of traffic.

The defendant railroads submitted that the orders of the Commission, being permissive general increase orders, were non-reviewable, relying on *Algoma Coal and Coke Co.* v. *United States*.[4] They further submitted that even if the orders were held to be reviewable, the I.C.C. had observed the required statutory standards and the orders of the Commission had contained adequate findings supported by substantial evidence.

The I.C.C. did not join in the jurisdictional objection proffered by the railroads but chose to defend its action on the merits, contending that it had made the requisite

2. Plfs. Brief p. 18.

3. 332 I.C.C. 285.

4. 11 F. Supp. 487 (E.D. Va. 1935) (hereinafter referred to as *Algoma*) and related cases, *infra*.

findings which were supported by substantial evidence.

The Court concludes that it lacks jurisdiction to review the questioned Commission orders, and that it is unnecessary, therefore, to reach the issues raised by the plaintiff shippers and the intervening Secretary of Agriculture.

It is to be noted that the rates which have become effective under the I.C.C. orders are permissive and not mandatory, and that the Commission in its Ultimate Conclusions and Findings in *Ex Parte 259* declared in No. 15:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act." 332 I.C.C. 792.

The foregoing declaration assures any aggrieved party, such as the plaintiffs herein, the opportunity to challenge any particular rates which affect them under the procedures provided in Section 13 of the I.C.C. Act, 49 U.S.C.A. §13.

Under such circumstances it is the Court's opinion that this case should be governed by *Algoma*[5]. In that case District Judge Chesnut, writing for a three-Judge court[6], noted:

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5. *Supra* Note 4, 11 F. Supp. at 493-494.

6. Circuit Judge Soper and District Judge Way sat with Judge Chesnut.

"The position taken by the plaintiffs seems to misconceive the real nature and effect of the Commission proceeding. They take the view that what the Commission did in effect was to determine what would be just and reasonable rates for particular traffic transported by particular railroads, on insufficient findings of fact.

• • • • • •

"[T]his misconceives what the Commission did. It *prescribed* no particular rates. It merely permitted the carriers to file new rates without suspension. It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under section 13 (49 USCA §13). That is to say, the increased rates now complained of are *carrier made* rates and not *Commission* made rates."

The factual and legal questions considered in *Algoma* are identical with those raised in the present proceeding; and, in the opinion of the Court, *Algoma* represents the applicable law.[7]

Accordingly, the complaint is dismissed.

EDWARD A. TAMM,
Circuit Judge

HOWARD F. CORCORAN,
District Judge

---

7. *Algoma's* position that the court will not entertain a suit to enjoin the Commission's orders in a general revenue proceeding where section 13's remedy has not yet been exhausted has been followed in *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955); *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd.* 352 U.S. 1021 (1957); *Atlantic City Electric Co.* v. *United States*, S.D.N.Y., F. Supp. (No. 69 Civ. 800, October 28, 1969).

Judge Wright's Dissent

Wright, Circuit Judge, dissenting: It is improper, in my judgment, to dismiss this suit at this time. Instead, I think we ought to examine the order now and decide whether the Commission's action was supported by substantial evidence. I am in complete agreement with the proposition that any plaintiff who wants to challenge any rate now being charged must first pursue his administrative remedies under Sections 13 and 15 of the Act. However, the plaintiffs here are not seeking to challenge the appropriateness of any rate or combination of rates. Instead, they wish to challenge the propriety of a Commission order which allowed the rates generally to be raised by the carriers. That order was predicated on a factual determination by the Commission that the nation's railroads need more freight revenue. That order, like any action of the Commission, must be based on substantial evidence. *Cf. United States* v. *Louisiana*, 290 U.S. 70, 77 (1933). Such an order is, of course, judicially reviewable, 28 U.S.C. §§1336, 2325 (1964), and I feel it is ripe for review now.

There can be no doubt that there are plaintiffs who are aggrieved now by this order. The effect of the order was to remove the upper limits on rates which the Commission had prescribed for certain commodities. Without this order, the railroads could not have increased any of the Commission-made rates. Shippers, therefore, are paying higher rates now as a direct result of this Commission determination. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

Considering challenges to the general order now would avoid needless relitigation of the same issue before the

Commission in countless rate-making proceedings involving individual commodities. Furthermore, I think that it would be difficult if not impossible for any shipper to challenge this determination of a nationwide railroad need for revenue in the context of an individual rate-making proceeding. This is the sort of threshold issue which ought to be determined once and for all at the outset, preferably, as plaintiffs here seek to do, in a class action.

I admit that there is little direct language in the existing cases supporting judicial review of the order now. Review now does seem eminently sensible to me, however, in spite of the fact that *Atlantic City*[1] seems to preclude it. Furthermore, both the *Algoma*[2] and the *Florida Citrus*[3] cases can be read as sanctioning this limited, threshold review. After holding that the plaintiffs could not challenge individual carrier-set rates until they were passed upon by the Commission, both courts did consider the propriety of the general order entered by the Commission. Both concluded that the general order was supported by substantial evidence. Consequently, neither of these cases,

1. *Atlantic City Electric Co.* v. *United States*, S.D. N.Y., F. Supp. (No. 69 Civ. 800, October 28, 1969).

2. *Algoma Coal & Coke Co.* v. *United States*, E.D. Va., 11 F. Supp. 487, 494-495 (1935).

3. *Florida Citrus Comm'n* v. *United States*, N.D. Fla., 141 F. Supp. 517, 524-527 (1956), *aff'd.* 352 U.S. 1021 (1957).

in my judgment, supports the disposition made here or in *Atlantic City*.[4]

I respectfully dissent.

J. SKELLY WRIGHT
Circuit Judge

---

4. It is not inconsistent to hold that individual rates must be first challenged before the Commission, but at the same time to permit judicial review of the propriety of the general order. Two different determinations are made by the Commission. In the first proceeding, which leads to the general order permitting the carriers to raise rates, the Commission determines that the railroads need more revenue. That order will stand if the court finds that it is based on substantial evidence. *Florida Citrus Comm'n* v. *United States*, *supra* Note 3, 144 F. Supp. at 524-527; *Algoma Coal & Coke Co.* v. *United States*, *supra* Note 2, 11 F. Supp. at 494-495. In the second proceeding, the Commission has to determine the reasonableness of individual rates. That determination, too, is subject to judicial scrutiny. 28 U.S.C. §1336 (1964); see *Swift & Co.* v. *United States*, 343 U.S. 373 (1952).

Judgment

In The

United States District Court

For the District of Columbia

Civil Action
No. 2970-68

Alabama Power Company, et al.,
Plaintiffs,

v.

United States of America

and

Interstate Commerce Commission,
Defendants.

The above-entitled cause having come on before this duly constituted Court of three judges, and the Court having considered the pleadings, briefs and oral argument of all counsel and having entered its opinion herein on December 3, 1969, it is hereby:

Ordered, that the relief prayed for in the complaints be, and it is hereby, denied in conformity with the reasons specified in our opinion entered herein on December 3, 1969, and the complaints be, and they are hereby, dismissed.

Dated this 18th day of December, 1969.

Edward A. Tamm
United States Circuit Judge

Howard F. Corcoran
United States District Judge

Notice of Appeal to the Supreme Court of the United States

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

Notice is hereby given that Alabama Power Company, American Paper Institute, Association of Home Appliance Manufacturers, Gas Appliance Manufacturers Association, Inc., Georgia Power Company, Gulf Power Company, Manufacturing Chemists' Association, Inc., Property Owners' Committee, Southern Electric Generating Company, Southern Paper Manufacturers Traffic Conference and Steel Shipping Container Institute, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on December 18, 1969.

This appeal is taken pursuant to 28 U.S.C. §1253.

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GEORGIA POWER COMPANY
GULF POWER COMPANY
SOUTHERN ELECTRIC GENERATING COMPANY

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Notice of Appeal to the Supreme Court of the United States

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By ARTHUR L. WINN, JR.
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SOUTHERN PAPER MANUFACTURERS TRAFFIC CONFERENCE
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ASSOCIATION OF HOME APPLIANCE MANUFACTURERS
GAS APPLIANCE MANUFACTURERS ASSOCIATION, INC.
MANUFACTURING CHEMISTS' ASSOCIATION, INC.
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Of Counsel

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ORDER NOTING PROBABLE JURISDICTION

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1283

ALABAMA POWER COMPANY, ET AL.,

Appellants,

v.

UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated with No. 1083 and a total of one and one half hours is allotted for oral argument.

May 18, 1970

Mr. Justice Douglas took no part in the consideration or decision of this order.

Volume II

CONSOLIDATED APPENDIX—PART C

In The

Supreme Court of the United States

October Term, 1969

No. [redacted] 78

Atlantic City Electric Company, et al.,

Appellants

v.

United States of America and Interstate Commerce Commission, et al.,

Appellees

On Appeal from the United States District Court for the Southern District of New York

Jurisdictional Statement Filed January 16, 1970

No. [redacted] 106

Alabama Power Company, et al.,

Appellants

v.

United States of America and Interstate Commerce Commission, et al.,

Appellees

On Appeal from the United States District Court for the District of Columbia

Jurisdictional Statement Filed March 5, 1970

Probable Jurisdiction in Both Cases Noted, and Cases Consolidated for Argument, May 18, 1970

CONSOLIDATED APPENDIX

IN THE

Supreme Court of the United States

October Term 1969

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#1283—ALABAMA POWER COMPANY, ET AL *v.* UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

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Part C

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PART C

Orders of the I.C.C. and Other Relevant Material in Ex Parte 259

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* References are to Item Nos. in Docket No. 1283.

** This Order was not included in the Record in either case. It is printed in the Appendix at the request of Appellees, Aberdeen & Rockfish Railroads, et al. by agreement of all parties.

Chronological List of Relevant Docket Entries

March 7, 1968	—Railroads' Petition for increased rates filed
March 8, 1968	—Special Permission Order 68-4000
March 11, 1968	—Master Tariff X 259 containing schedules of increases filed by Railroads
June 19, 1968	—Order of Suspension permitting interim 3% increase
July 3, 1968	—Order dividing case into sub-proceedings
November 25, 1968	—Interim Report and Order of Commission
January 9, 1969	—Report and Order of Commission

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Railroads' Petition for Orders Permitting the Filing of Increased Freight Rates and Charges and for the Relief Necessary to the Assessment of Such Charges

---

Curtis H. Berg
Thomas O. Broker
Benson T. Buck
John J. Burchell
Charles W. Burkett
C. W. Chapman
J. T. Clark
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March 7, 1968

Application is hereby made on behalf of the petitioners listed in Appendix A hereof, being substantially all of the Class I railroads of the United States and some railroads of other classifications, and on behalf of certain water and

motor carriers having joint rates with said railroads, for authority to depart from the Commission's tariff rules, and for such other relief as may be necessary to enable them to publish increases in freight rates and charges to and from points generally throughout the United States, and to and from points in Canada, by means of a master tariff, connecting link supplements and other necessary tariffs and supplements.

Application is also made for the modification of all outstanding orders of the Commission to the extent necessary, (1) to permit, initially, only the publication of the proposed increases in rates and charges, and (2) following the receipt and consideration of evidence in the form of verified statements, to permit the actual charging of the proposed increases upon a finding that the general level of rates as increased will be just and reasonable.

The special circumstances and conditions which justify the relief sought herein are as follows:

I.

In its final decision in *Ex Parte 256 Increased Freight Rates, 1967*, 332 I.C.C. 280 (February 6, 1968), the Commission referred to its previous findings that the 1950 and 1951 rates of return of the Class I railroads were "substandard and inadequate." These were 4.28 percent and 3.76 percent, respectively. The Commission then noted that interest rates have risen substantially since that time and that prime utility bonds and railroad equipment obligations are yielding interest of over 6 percent, and it found that "the inadequacy of the present rate of return of less than 4 percent is clear."

In sharp contrast to these conclusions is the fact that the rate of return for the Class I railroads in 1967 fell to

2.46 percent. This was the lowest rate of return experienced by the railroads of the nation in the entire post-World War II period, excepting only those for 1960 and 1961, years of severe economic dislocations. The rates of return for the railroads of the several districts in 1967 were: Eastern District, 1.60 percent; Southern District, 3.87 percent; and Western District, 2.76 percent.

II.

The net railway operating income of the Class I railroads fell from $1,045,900,000 in 1966 to $677,000,000 in 1967. The 1967 net railway operating income was lower than in any year since 1946, excepting the aforesaid years, 1960 and 1961.

Although the purchasing power of the dollar is substantially less today than it was in the immediate post-war period, net railway operating income in 1967 was lower than in any year of the decade beginning with 1947. It was over $100,000,000 more in 1947 than it was twenty years later in 1967. Yet the net investment in properties devoted to the transportation service was nearly $5 billion more in 1967 than in 1947.

Net railway operating income for the railroads of the several districts also showed marked declines in 1967 as compared with 1966. That for the Eastern District dropped from $385 million to $176 million; that for the Southern District from $183 million to $164 million; and that for the Western District from $478 million to $337 million.

III.

By its interim decision in *Ex Parte 256*, 329 I.C.C. 854 (July 31, 1967), the Commission approved increased rates

and charges which became effective on August 19, 1967. The Commission estimated that the increases authorized would produce additional gross revenues of approximately $298.6 million annually, or $29,000,000 less than the railroads had sought. In its final report in that case, the Commission stated that modifications required therein, involving some further increases and some reductions, would offset each other to a substantial extent. Had the increases finally approved been in effect for the full year 1967, net railway operating income would have been only $820,000,000 and the rate of return only 2.99 percent.

IV.

The foregoing dangerously low level of earnings must be considered against the fact that the railroads are experiencing large increases in wages, prices of railway materials and supplies, and other costs over and above those submitted by the railroads in *Ex Parte 256*. With relatively minor exceptions, those cost increases were not experienced in 1967. The increases include the following:

Wage settlements effective in 1967 in excess of the 5% increase for which costs were submitted in Ex Parte 256:

Additional 1% for engineers and conductors, 8-1-66.

Additional 1% for shoperafts and dispatchers, 1-1-67

Additional 6% for engineers working without firemen, 1-1-67

Increased car scales for conductors, 8-1-67

Increases of 5¢ per hour for journeymen and mechanics, 4-1-67 and 10-1-67

Railroads' Petition

Wage rate increases in 1968, including potential increases on basis of indicated pattern:

1-1-68 increases of 2.5% for trainmen, firemen and all nonops except shoperafts and train dispatchers, and 4.3% for dispatchers

7-1-68 increases of 3.5% for trainmen, firemen and all nonops except shoperafts and train dispatchers

7-1-68 increases of 5.0% for shoperafts, engineers and conductors

7-1-68 payment of 5¢ per hour for clerks' special fund

4-1-68 and 10-1-68 increases of 5¢ per hour for journeymen and mechanics

Other labor costs:

Award of Arbitration Board 298, lodging, meals and travel pay allowances, 10-15-67

Increase of .25% in rate of payroll tax for retirement and medicare, 1-1-68

Increase in maximum taxable pay per month for retirement and medicare from $550 to $650, 1-1-68

Increase in cost of hospital, medical and life insurance, 3-1-68

Material price increase of approximately 3%

Depreciation expense increase, 1968 over 1967

V.

These cost increases will approximate a gross annual figure of a half billion dollars. They cannot be met by further reduction in employment resulting from additional

capital expenditures, or otherwise. The imposition of these drastically higher wage rates and price levels upon earnings which are already dangerously low would bring railroad rates of return and net railway operating income to perilously low levels.

VI.

In its February 6, 1968 decision in *Ex Parte 256*, the Commission referred (p. 289) to a leading annual statistical publication comparing industries on the basis of their return on net worth, wherein, for 1966, the railroads "ranked 72d from the top in a list of 73." It then noted the railroads' reliance on continued advances in efficiency to satisfy in part their increased revenue needs. It observed that such efficiencies can be realized only by the expenditure of large amounts of money for capital improvements, that "the need for large capital expenditures for additions and betterments to rolling stock and for modernized facilities will not abate in the foreseeable future ..." (289), and it concluded (290) that "to the significant extent that money must be borrowed to finance such improvements in the future, it is plain that the credit position of the railroads must be sustained by an adequate and realistic level of earnings."

Without the increases in freight rates and charges now sought to be published, the railroads' earnings would be seriously inadequate to finance needed improvements and they would be insufficient for the maintenance of adequate, economical and efficient service and for the preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the postal

service, and of the national defense, contrary to the objectives of the National Transportation Policy.

VII.

The increases in freight rates and charges which the railroads seek to publish have been carefully considered by their Traffic Officers from the standpoint of their possible effect on the movement of traffic. They have reached the conclusion that the increases would have no substantial effect on the movement of the traffic, and the railroads' verified statements to be submitted in support of their application will substantiate that conclusion.

VIII.

The general level of the increased rates and charges will be just and reasonable.

The rates, as increased, will be immune from the doctrine of *Arizona Grocery Co.* v. *Atchison T. & S. F. Ry. Co.*, 284 U.S. 370. They will also be subject to a refund provision for application to any rate permitted to become effective without suspension and later found unreasonable after such further investigation as the Commission may deem to be required. This is a protection which is in addition to the remedies provided by the Act, to all of which the increased rates and charges would be subject.

IX.

It would be wholly impracticable to publish the proposed increases in rates and charges by the filing of the thousands of tariffs and tariff supplements which would be required in the absence of relief from the Commission's tariff publishing rules and, therefore, it is necessary, as

a practical matter, to publish such increases in the manner proposed.

X.

Applicants are confronted with an emergency which requires that the relief here sought be granted at the earliest practicable date.

XI.

Applicants' proposal has already been given widespread publicity in transportation journals and otherwise. Their proposed tariff would be mailed, on or about March 11, 1968, to all who were parties to *Ex Parte No. 256*. Copies thereof will also be furnished to any other person who makes request therefor, and will be lodged in the Regional Offices of the Interstate Commerce Commission.

WHEREFORE, Applicants pray that the Commission

(1) grant authority to depart from the Commission's tariff rules to the extent necessary to enable the railroads to publish the proposed increases in freight rates and charges by means of a master tariff, connecting link supplements, and other necessary tariffs or supplements,

(2) modify all outstanding orders to the extent necessary to permit, initially, only the publication of the aforesaid increases in rates and charges; this preliminary and partial modification of outstanding orders is a purely technical step required to permit of the publication of the proposed increases in tariff form,

(3) fix a schedule for the receipt of verified statements by those in favor of the proposed increases and by

any who may be in opposition thereto, and otherwise provide for the procedure to be followed in considering the proposed increases in rates and charges, and

(4) following the receipt of evidence in the form of verified statements, to enter an order modifying all outstanding orders so as to allow the assessment of the proposed increased rates and charges, and enter such further orders granting new and modified Fourth Section Relief and all other relief that may be necessary to permit the proposed tariffs to become effective without suspension.

Respectfully submitted,

Curtis H. Berg
Thomas O. Broker
Benson T. Buck
John J. Burchell
Charles W. Burkett
C. W. Chapman
J. T. Clark
Charles H. Clay
Monroe E. Clinton
John A. Daily
John C. Danielson
J. R. Davis
J. H. Doeringer
Louis A. Harris
E. E. Hunt
Harvey Huston
Edward A. Kaier
Bruce Kopper
R. J. Lally
Don McDivitt
R. J. Murphy
J. J. Nagle
W. J. O'Brien

Prime F. Osborn
C. A. Prior
John F. Reilly
Charles C. Rettberg, Jr.
Albert B. Russ, Jr.
R. J. Schreiber
R. D. Sickler
John F. Smith
J. M. Souby, Jr.
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D. L. Tolmie
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W. G. Treanor
M. W. Warnock
J. C. Waterman
Robert J. Williams
Attorneys for Petitioners

1024 Transportation Building
Washington. D. C. 20006
March 7, 1968

(Appendix A omitted. For a list of Class I Railroads, see Exhibit A to the Railroads' Motion to Intervene, in Part A at p. 13a, *supra*.)

I.C.C. Special Permission Order No. 68-4000

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., this 8th day of March, 1968.

Upon consideration of a petition filed by Edward A. Kaier, and other attorneys, dated March 7, 1968, for and on behalf of substantially all Class I Railroads of the United States, and some Railroads of other classifications, and on behalf of certain water and motor carriers having joint rates with said railroads, for authority to depart from the Commission's tariff-publishing rules to the extent necesary to enable such carriers to publish general increases in varying amounts in freight rates and charges by means of a master tariff and other short-form methods, and for modification of all outstanding orders of the Commission to the extent necessary to permit only the publication of the aforesaid increases in rates and charges;

For good cause shown it is ordered:

1. Carriers for and on whose behalf the above-mentioned petition was filed, and their tariff-publishing agents, be, and they are hereby, authorized to depart from the Commission's tariff-publishing rules when posting and filing tariffs to become effective on not less than seventy-five days' notice to the Commission and to the public but not earlier than May 27, 1968, providing for increased rates and charges set forth above in the following manner:

(a) By publication and filing of a master tariff of increased rates and charges, which shall contain a provision reading substantially as follows:

"In the event any increases resulting from the application of this tariff exceed the increases subsequently approved or prescribed by the Interstate Commerce Commis-

sion, the carriers will refund the difference between the increases resulting from the application of this tariff and any increases which may subsequently be approved or prescribed by the Interstate Commerce Commission."

"In the event an increase resulting from the application of this tariff is disapproved by the Commission and no increases is authorized, the carriers will refund the full amount of the increase collected."

(b) By publication and filing of connecting-link supplements to one or more tariffs connecting such a tariff or tariffs with the master tariff of increased rates and charges.

(c) By publication and filing of tariffs or supplements of specific increased rates and charges, subject to the same provision concerning refunds as contained in paragraph 1(a), and

(d) By publication of provisions in tariffs or supplements subjecting the rates and charges therein to the provisions of the master tariff.

2.(1) Master tariffs, supplements thereto, and supplements to tariffs which are issued in short-form method shall bear notation reading substantially as follows:

The form of this publication is permitted by authority of Interstate Commerce Commission Permission No. 68-4000 of March 8, 1968.

(2) Other tariffs or supplements containing specific increased rates or charges shall bear notation reading:

This publication is issued under authority of Interstate Commerce Commission Permission No. 68-4000 of March 8, 1968.

3. Connecting-link supplements authorized herein shall be exempt from the Commission's tariff-publishing rules relating to the number of supplements and volume of supplemental matter permitted. This and all other relief from the Commission's tariff-publishing rules authorized herein shall expire with March 8, 1969.

4. Outstanding orders of the Commission are modified only to the extent necessary to permit the filing of tariffs containing the proposed increased rates and charges, and all tariffs filed shall be subject to protest, suspension, or rejection.

And it is further ordered, That notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Office of the Federal Register.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

I.C.C. Order of Suspension

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 19th day of June, 1968.

Ex Parte No. 259

Increased Freight Rates, 1968

It appearing, That on March 11, 1968, substantially all of the Class I railroads and many other carriers filed schedules of increased freight rates and charges under authority of Section 6 of the Interstate Commerce Act and Special Permission Order No. 68-4000 issued by the Commission, said tariff schedules to become effective June 21, 1968, subject to possible investigation and suspension by the Commission as provided by the Act;

It further appearing, That on March 7, 1968, the above railroads together with certain water and motor carriers filed a petition requesting the issuance of orders granting relief from outstanding orders entered by the Commission in previous cases, for relief from Section 4 of the Act, and for all other relief necessary to permit the aforesaid schedules to go into effect without suspension but subject to the condition that refund be made in the event that, after full investigation, no increase or a lesser increase than that set forth in the schedules is allowed with respect to particular rates; and also asking that after complete investigation the Commission grant all final relief necessary to the charging of the aforesaid increased rates and charges;

It further appearing, That by order of the Commission herein dated March 12, 1968, the above railroads were ordered to file and serve on or before March 25, 1968 statements in support of their petition and in justification of the proposed tariffs;

I.C.C. Order of Suspension

It further appearing, That the Commission's order of March 12, 1968, as amended, provided that any party in opposition to the railroad's petition could file statements on or before May 20, 1968, and be heard in oral argument before the Commission beginning on June 13, 1968;

And it further appearing, That the Commission having considered the views of the parties in verified statements, protests, replies, briefs, and oral argument, therefore;

It is ordered, That the operation of the following schedules be, and it is hereby, suspended, and that the use thereof on interstate and foreign commerce be deferred to and including January 23, 1969, unless otherwise ordered by this Commission:

> TARIFF OF INCREASED RATES AND CHARGES, X-259, issued jointly by Western Trunk Line Committee, Agent, its I.C.C. No. A-4696, and other designated agents:
>
> Tariff X-259 and SUPPLEMENTS NOS. 1, 2, and 3 thereto;

It is further ordered, That the carriers parties to this proceeding be, and they are hereby, authorized to establish upon not less than one day's notice to the Commission and the public by filing and posting in the manner prescribed in the Interstate Commerce Act an increase not to exceed 3 percent (except for disposition of fractions) subject to maximums no higher than specified in the suspended tariff of increased rates and charges, X-259, and in no event to produce a greater revenue in connection with any rate or charge on any particular commodity or service than proposed in X-259;

It is further ordered, That an investigation be, and it is hereby instituted into and concerning the lawfulness of

all the rates, charges, and regulations which were contained in the suspended schedules, as aforesaid, as well as the schedule herein authorized to be filed, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant, all the said schedules to be subject to a refund provision the same as set forth in the aforesaid tariff of increased rates and charges, X-259;

And it is further ordered, That all outstanding orders of the Commission be, and they are hereby modified to permit the increases authorized herein to become effective.

FOURTH SECTION ORDER NO. 20213

It appearing, That carriers parties to the proceeding applied for relief from the provisions of Section 4 necessary to establish the rates and charges originally sought; and that the increases in rates and charges authorized herein cannot be published and made effective without producing in some instances rates or charges that yield greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, or greater compensation as a through rate or charge than the aggregate of intermediate rates or charges subject to the act, in contravention of Section 4 thereof;

It is ordered, That carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to establish and maintain the increased rates and charges described herein without observing the provisions of Section 4 of the act;

It is further ordered, That parties to said proceeding be, and they are hereby, authorized to establish and maintain

rates and charges permitted to become effective in this order without observing the long-and-short-haul provision of Section 4 of the act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by the failure of the State authorities to authorize the full increases permitted in this proceeding;

And it is further ordered, That in those instances in which rates in contravention of Section 4 are established under authority contained herein, the schedule containing such rates shall make reference to this order in the manner required by Rule 28 of Tariff Circular No. 20.

AMENDMENT TO SPECIAL PERMISSION No. 68-4000 AUTHORIZING CERTAIN DEPARTURES FROM THE COMMISSION'S PUBLISHED TARIFF REGULATIONS

It is ordered, That Special Permission No. 68-4000 be, and it is hereby, amended to permit the establishment of the increases in freight rates and charges authorized by the Commission in this order, subject to the terms, conditions and limitations provided therein.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

I.C.C. Order Dividing Case into Sub-Proceedings

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C. on the 3rd day of July, A. D. 1968.

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968[1]

It appearing, That by order dated June 19, 1968, the Commission suspended the operation of schedules of increased rates and charges, Tariff No. X-259, and instituted an investigation into and concerning the lawfulness of all increases in rates and charges, and regulations contained in the schedules referred to therein, including the schedules therein authorized to be filed;

It is ordered, That, for the purpose of receiving evidence and argument with respect thereto, the Commission has assigned the following sub-numbers to the schedules and issues involved herein:

Sub-No. 2—Railroad cost and revenue need

Sub-No. 3—Coal

Tariff Item Nos. 1065, 1070, 1075, 1080, 1085, 1090, 1095, 1100

Sub-No. 4—Iron and steel scrap—pig iron—iron ore

Tariff Item Nos. 845, 1060

Sub-No. 5—Grain—sugar beets & cane—sugar—molasses—flour—coffee—bakery products

Tariff Item Nos. 515, 520, 525, 560, 570, 580, 675, 680

Sub-No. 6—Accessorial charges—line haul—minimum charges—absorption—transit

Tariff Item Nos. 100, 110, 115, 130, 150, 155, 160, 165, 170, 180

1. The order embraces Ex Parte No. 259, Increased Freight Rates, 1968, Sub-number 2 through Sub-number 11.

I.C.C. Order Dividing Case Into Sub-Proceedings

Sub-No. 7 — Woodpulp — pulpwood — textile and paper waste — paper — lumber — cotton — textiles apparel—synthetic fibers—wool

Tariff Item Nos. 500, 505, 510, 690, 695, 700, 705, 710, 715, 720, 725, 900, 925, 970

Sub-No. 8—Farm products—fruits—nuts—meat—canned goods—dairy products—poultry & eggs—starch—tapioca—tallow—liquor—tobacco—hides

Tariff Item Nos. 530, 535, 540, 545, 550, 555, 565, 575, 585, 590, 595, 600, 685, 910, 915, 920, 935, 940

Sub-No. 9 — Fertilizer — aggregates — limestone — sand — asphalt — potash — shells — cement — brick — clay — lime — chemicals — gases — petroleum products—acids—pulp mill by-products—paint—drugs—soap—latex—tires

Tariff Item Nos. 605, 610, 625, 630, 635, 640, 645, 655, 660, 730, 740, 745, 750, 755, 760, 765, 770, 775, 780, 785, 790, 795, 800, 805, 810, 815, 820, 825, 830, 835, 950, 975, 980, 985, 990, 1020 (Shells)

Sub-No. 10—Miscellaneous ores—metal products—batteries— non-ferrous scrap—salt—radio-active materials—sulphur—phosphates

Tariff Item Nos. 615, 620, 650, 665, 670, 735, 840, 865, 1000

Sub-No. 11—Metal castings—iron and steel products — pipe — machinery — household appliances — vehicles—instruments and parts—furniture—fixtures—tiles—miscellaneous manufactured items—guns—ammunition—glass—abrasives—marine products—etc.

Tariff Item Nos. 850, 855, 860, 870, 875, 880, 885, 890, 895, 905, 930, 945, 955, 960, 965, 995, 1005, 1010, 1015, 1020 (except shells), 1025, 1030, 1035, 1040, 1045, 1050, 1055

It is further ordered, That the Special Rules of Practice and Procedure hereinafter set forth shall apply:

(a) verified statements and reply verified statements heretofore filed in this proceeding pursuant to the provisions of sub-paragraphs (a) and (b) of the second ordering paragraph of the order of March 12, 1968 need not be resubmitted, but any party desiring to have his statement made part of the record must notify the Commission and opposing parties, as described in sub-paragraphs (c) and (d) herein, on or before the date hereinafter provided for the filing of additional verified statements, of the Sub-Numbers and commodities embraced therein under which he desires such statement to be considered. Such statements, as well as those set forth in sub-paragraph (b), will be subject to the right of other parties to object to all or any part thereof. If any verified statement submitted pursuant to this order contains cost or other studies, the party submitting such statement shall make available to any other party, upon request, all underlying data supporting such studies.

(b) verified statements in addition to those heretofore filed in this proceeding may be filed by any person. Each such statement shall be confined to a specific sub-numbered proceeding and the involved commodities which shall be designated on the cover or first page of such statement. All such statements shall be duly verified in the manner provided by Rule 1.50 and Form No. 6 of the General Rules of Practice.

(c) an original and 24 copies of additional verified statements in support of respondents shall be furnished to the Commission and a copy served upon each party which filed a protest, verified statement or brief in opposition in this proceeding. One additional copy shall be sent by first class mail to each of the regional offices of the Commission listed in the appendix hereto, where it will be open to public inspection. Copies of such statements shall

be furnished to any interested person upon request. Such statements must be filed on or before August 12, 1968 and shall include a certificate of service on opposing parties.

(d) an original and 24 copies of additional verified statements of persons in opposition to said schedules shall be furnished to the Commission. Service of 25 copies upon Mr. Edward A. Kaier, 1036 Transportation Building, Washington, D. C. shall constitute service upon all respondents. One copy of each additional verified statement shall be sent by first class mail to each of the regional offices of the Commission, where it will be open to public inspection. These statements must be filed on or before September 3, 1968 and shall contain a certificate of service on opposing parties. Copies shall be furnished to any interested party upon request addressed to the witness or his counsel.

(e) any party desiring to cross-examine witnesses for the respondents must give notice, in writing, of such demand to the witness and his counsel with copy to the Commission on or before August 23, 1968. Respondents must give similar notice of their desire to cross-examine witnesses for the protestants on or before September 9, 1968.

It is further ordered, That the hearings in:

(a) Ex Parte No. 259 (Sub-No. 2) INCREASED FREIGHT RATES, 1968, will commence on September 9, 1968 at 9:30 o'clock a.m. District of Columbia Daylight Saving Time at the offices of the Interstate Commerce Commission, Washington, D. C.

(b) Ex Parte No. 259 (Sub-No. 6) INCREASED FREIGHT RATES, 1968, Ex Parte No. 259 (Sub-No. 4) INCREASED FREIGHT RATES, 1968, and Ex Parte No. 259 (Sub-No. 3) INCREASED FREIGHT RATES, 1968, will

commence on September 16, 1968 at 9:30 o'clock a.m. District of Columbia Daylight Saving Time at the offices of the Interstate Commerce Commission, Washington, D. C.

(c) Ex Parte No. 259 (Sub-No. 5) INCREASED FREIGHT RATES, 1968, Ex Parte No. 259 (Sub-No. 7) INCREASED FREIGHT RATES, 1968, and Ex Parte No. 259 (Sub-No. 8) INCREASED FREIGHT RATES, 1968 will commence on September 25, 1968 at 9:30 o'clock a.m. District of Columbia Daylight Saving Time at the offices of the Interstate Commerce Commission, Washington, D. C.

(d) Ex Parte No. 259 (Sub-No. 9) INCREASED FREIGHT RATES, 1968, Ex Parte No. 259 (Sub-No. 10) INCREASED FREIGHT RATES, 1968 and Ex Parte No. 259 (Sub-No. 11) INCREASED FREIGHT RATES, 1968, will commence on October 7, 1968 at 9:30 o'clock a.m. District of Columbia Daylight Saving Time at the offices of the Interstate Commerce Commission, Washington, D. C.

It is further ordered, That this proceeding be, and it is hereby, referred to such hearing examiners as may be hereafter designated for hearing at the times and place set forth above and that this proceeding will not be the subject of an examiner's recommended report and order because due and timely execution of our functions requires an expedited decision.

Ex Parte No. 259 publication in the Federal Register as notice to interested parties.

By the Commission, Division 2.

H. NEIL GARSON,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968

INTERIM REPORT AND ORDER

[590]

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968

Decided November 25, 1968

1. After hearing and consideration of briefs, found that the Nation's railroads are in immediate need of increased freight revenue to offset rising operating costs.

2. As interim relief, order entered June 19, 1968, suspending tariff schedules, vacated in part.

3. Investigation of all proposed increases in rates and charges continued.

4. Appropriate order entered, including modification of our outstanding orders and fourth-section relief.

Andrew C. Armstrong, Curtis H. Berg, John J. Burchell, Charles W. Burkett, Martin L. Cassell, Charles W. Chapman, J. T. Clark, Charles H. Clay, Monroe E. Clinton, John A. Daily, J. R. Davis, J. H. Doeringer, Paul R. Duke, Stuart F. Gassner, Edward R. Gustafson, John W. Hanifin, Louis A. Harris, W. P. Higgins, James L. Howe III, E. E. Hunt, Harvey Huston, Edward A. Kaier, W. A. Kimbrough, Jr., W. Bruce Kopper, A. W. Laisy, R. J. Lally, Ralph L. Lanigan, Harry B. LaTourette, Don McDevitt, John D. Morrison, Robert C. Morton, Richard J. Murphy, J. J. Nagle, Milton E. Nelson, Jr., W. J. O'Brien, Prime F. Osborn, C. Harold Peterson, C. A. Prior, John F. Reilly, Charles C. Rettberg, Jr., Albert B. Russ, Jr., R. J. Schreiber, Preston C. Shannon, R. D. Sickler, John F. Smith, J. M. Souby, Jr., R. H. Stahlheber, Richard H. Strodel, James L. Tapley, D. M. Tolmie, L. E. Torinus, Jr., W. G. Treanor, M. R. Warnock, J. C. Waterman, John E. Weiss, and *Robert J. Williams* for respondents.

Charles H. Gilbert, E. F. Heitz, William A. Imhof, James H. Lang, Charles M. Pearson, Leon Schill, and *Ronald P. Vail* for the Secretary of Agriculture.

Ralph L. Trisko and *Pedro R. Vazquez* for the Department of Commerce.

Dellon Coker for the Department of Defense.

Murray Chais for the Atomic Energy Commission.

Leonard M. Shinn for General Services Administration, Department of Defense, and other government agencies.

[591] *Robert F. Lenzi* for General Services Administration.

James M. Henderson for the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, New Jersey, Delaware,

Maryland, Pennsylvania, and Virginia and other Virginia interests.

Robert A. Lane for the State of California and the California Public Utilities Commission.

Hector Anninos, Robert A. Lane, and *Mary Moran Pajalich* for the California Public Utilities Commission.

John J. Finsness for the Kansas State Corporation Commission, South Dakota Public Utilities Commission, North Dakota Public Service Commission, Montana Board of Railroad Commissioners, Minnesota Department of Public Service, Nebraska State Railway Commission, and the Wyoming Public Service Commission.

Maynard C. Dolloff and *Frank D. Reed* for the Maine Department of Agriculture.

John L. Crothers, Jr. for the Maryland State Board of Agriculture.

Jerome E. Pederson for the Minnesota Public Service Commission.

C. Lowell Purdy for the Montana Commissioner of Agriculture.

Gordon E. Ganka for the Nebraska State Railway Commission.

Robert L. Christensen for the New Hampshire Department of Agriculture.

Phillip Alampi for the New Jersey Department of Agriculture.

Louis J. Lefkowitz, Walter J. Myskowski, and *Dunton F. Tyman* for the State of New York.

D. M. Dalrymple for the New York State Department of Agriculture and Markets.

John M. Agrey for the North Dakota Public Service Commission.

Charles O. Ham, Jr. for the State of Oklahoma Corporation Commission.

Thomas W. Dench, Sam R. Haley, and *James E. Singleton* for the Public Utility Commissioner of Oregon.

Leland H. Bull for the Pennsylvania Department of Agriculture.

Eugene P. Springer for the South Dakota Public Utilities Commission.

Maurice B. Rowe for the Virginia Department of Agriculture and Commerce.

Arthur W. Jacocks for the Virginia State Ports Authority.

William R. Brumfield and *Harold C. Heublein* for the Wisconsin Public Service Commission.

Karl E. Bakke, Michael Bradfield, Walter Hollis, George D. Krumbhaar, Jr., W. Patrick Morris, John B. Rehm, Fred B. Smith, Pedro [592] *R. Vazquez, Edward Weinberg, John Geoffrey Will,* and *Bruce Wright* for the Federal Interagency Committee on Coal Exports.

William B. Adams, Stanley W. Akers, V. Alexander, W. P. Allen, Jr., Eugene D. Anderson, Gordon R. Anderson, William C. Andrews, John J. Archer, Arthur A. Arsham, Robert C. Bachelder, William L. Bailes, Jr., Robert L. Banks, Howard J. Benson, Klaus Bergman, James E. Bilbo, Jacob P. Billig, Douglas W. Binns, Richard B. Blackwell, Calvin L. Blaine, Chas. E. Blaine, Robert A. Blocki, R. F. Bohman, Sr., George H. Borts, Harold A. Bowron, Jr., J. Robert Bray, Edward K. Brenner, Jerry H. Brenner, Charles A. Brock, Charles T. Brookman, Frank C. Brooks, Carman E. Brown, Charles L. Bucy, Robert S. Burk, John H. Caldwell, Donald J. Carlson, William L. Carter, Bernard B. Caruso, Richard A. Chrz,

J. Raymond Clark, John M. Cleary, M. J. Cloughesy, Garth Coffin, Albert Cohen, Clyde Comstock, C. D. Coppinger, D. H. Core, Jr., Leon Coslov, Richard E. Costello, Leslie M. Cox, Richard Crabtree, Fred S. Crittenden, D. P. Cromwell, Norman L. Cummins, F. P. Daleiden, Wilma M. Dalton, A. P. Davis, Jr., M. J. Davis, J. Douglas Dawson, William D. Day, Samuel P. Delisi, Edward J. Dempsey, Ray B. Dewey, James A. Diehl, Norman E. Dietrich, C. R. Dollinger, Sr., John Dollinger, Jr., John F. Donelan, Fred C. Dontel, James L. Downs, George B. Dutton, Jr., Samuel W. Earnshaw, Milton K. Eckert, Harry Eggert, Scott H. Elder, Vernon L. Everngam, Ernest Falk, Glen L. Fast, Gerald W. Fauth, Jr., W. E. Fincher, A. William Finke, R. C. Flesch, Robert H. Foltz, Charles F. Forgue, Max G. Fortune, Max E. Foster, Edward B. Frankel, Samuel R. Freeman, Alfred E. Froh, Richard W. Gaudern, F. E. George, John W. Gibius, Kenneth L. Gillis, Irving R. Glass, Richard Gordon, Robert H. Gorske, Howard Gould, J. L. Guthrie, George F. Hall, G. Robert Hallett, Jr., Roy Hancock, T. Vernon Hansen, Richard J. Hardy, Robert E. Harridge, Richard Harrington, Louis B. Hartlage, Leo P. Hearn, George A. Heitz, R. J. Helm, James M. Henderson, Joseph W. Hepburn, Raymond M. Hilbert, Walter Hoffman, Brian Holtz, John L. Hopkins III, O. Denton Hudson, Bernard Hulkower, John Hummel, Joseph A. Illes, James J. Irlandi, James M. Jones, Jr., N. J. Jordan, S. Harrison Kahn, R. E. Kanauss, William Q. Keenan, Leo J. Kelleher, Jr., Charles A. Kelly, Daniel J. Kennedy, John A. Kennedy, Jr., John J. Kerr, Robert Kharasch, L. O. Kimberly, Jr., Fred M. Kimbrough, Wade Kimsey, Edward S. Kirby, T. B. Kircher, Alan M. Kirk, Robert M. Koch, Dwight L. Koerber, David A. Kosh,

I.C.C.'s Interim Decision

James S. Laird, John F. Lane, Carl J. Lessing, Robert Levin, Arnold Levy, William M. Lewis, Jr., Robert C. Liebenow, [593] *Eugene T. Liipfert, William J. Lippman, Dickson R. Loos, Frank Loughran, Gordon P. MacDougall, William M. Maddox, Nate Magid, L. D. Mangan, Edwin E. Marsh, Sheila H. Marshall, Lauman Martin, Phillip A. Martin, C. L. Mayfield, Charles J. McCarthy, Don McDevitt, Graham W. McGowan, Thomas F. McGrath, C. McIntosh, Kathleen C. McManus, R. W. Meckfessel, Charles M. Meehan, Henry P. Megargee, Jr., Joseph M. Michaels, G. G. Miller, John L. Miller, Reeder C. Miller, S. H. Moerman, Marvin H. Morse, James F. Mulligan, John C. Mundt, George H. Nafziger, Alfred J. Navaroli, Robert M. Neary, Wesley C. Newman, J. H. Norton, Allen J. O'Brien, Lawrence J. O'Connor, C. V. O'Hern, Jr., James J. O'Malley, Jr., Samuel Omasta, Richard G. Olson, D. J. Osbjornson, L. A. Parish, John T. Parkinson, Gilbert J. Parr, J. D. Patterson, Leroy E. Peabody, Jr., Richard H. Pennell, Robert R. Pester, John S. Peters, John W. Peterson, Leonard E. Peterson, M. G. Peterson, E. H. Pierson, Harold M. Pockrose, Frank E. Polom, K. M. Potter, Roy B. Powell, M. T. Power, Harry D. Pugsley, Francis P. Pusateri, T. A. Quintrell, Clarence R. Reed, Lawrence A. Reedquist, Joseph V. Regan, David Reichert, Arthur M. Ribe, Charles H. Rice, Jack E. Richert, E. V. Robinson, Jr., Alfred A. Rochester, O. H. Roehling, Allan A. Rubin, James A. Ruffalo, Henri F. Rush, Jr., Charles Rust, William A. Ryan, John R. Scanlan, L. Schaffel, Robert M. Scott, Durward Seals, Herbert W. Sears, S. L. Seftenberg, Ashley Sellers, John L. Shissler, Jr., F. L. Sigloh, Jerome H. Simonds, Clarence E. Sims, Charles W. Singer, William L. Slover, Charles F. Smith, Darrell H. Smith, Jr., E. R.*

Smith, Milton H. Smith, William K. Smith, William U. Smith, Wilson W. Snyder, William P. Spencer, John C. Spychalski, Charles W. Stadell, John R. Steutevjlle, Oliver L. Stewart, Tyrus C. Stewart, Nelson A. Stitt, T. M. Storer, William S. Story, Martin F. Strate, Elmer F. Streib, Charles O. Strickler, W. J. Sullivan, Daniel J. Sweeney, J. L. Tompkins, William H. Towle, Matthew L. Triggs, Thomas H. Truitt, Benjamin Trumbull, Jack R. Turney, Jr., Harry P. Vaughan, Clinton H. Vesselius, C. H. Wager, H. F. Wagner, Van B. Wake, J. F. Wallace, John A. Ward, Richard G. Warren, C. C. Warwick, Paul P. Watkins, M. R. Watson, Everett A. Weathers, E. Jerome Webster, Jr., Ben Weiner, George B. Weir, M. W. Wells, M. W. Wells, Jr., Robert R. Wertz, J. S. White, Jr., Henry M. Wick, Jr., Harter W. Williams, Arthur L. Winn, Jr., Louis H. Winnard, George Thomas Wright, Joseph W. H. Wright, and *Charles H. Wulff* for protestants.

[594] INTERIM REPORT OF THE COMMISSION

By the Commission:

This proceeding concerns comprehensive increases in freight rates and charges proposed by the railroads to offset rising operating costs. The last permanent general increase was permitted in Ex Parte No. 256, *Increased Freight Rates, 1967,* 329 I.C.C. 854; 332 I.C.C. 280. On March 7, 1968, approximately 1 month after the final report in that proceeding was issued, substantially all of the class I railroads of the United States and some railroads of other classifications, for themselves and on behalf of certain water and motor carriers, filed a petition for authority to depart from the rules governing tariff publication to permit the proposed increases to be published and filed in

a short form, which was granted. The petitioners also sought modification of outstanding rate orders, authority to depart from section 4 of the Interstate Commerce Act, and all other relief that might be necessary to permit the proposed increases to become effective without suspension.

Increased rate proposal.—On March 11, 1968, the railroads filed their master increase tariff, X-259, containing the schedules of proposed increases in freight rates and charges.[1] Originally published to become effective on May 27, 1968, this date was subsequently voluntarily postponed to June 24, 1968. The proposed increases range generally from 3 to 10 percent and for the most part they are 6 percent or less. As in prior proceedings, a special refund provision is included which will have application in situations where no increase or something less than the full increase proposed is authorized in this proceeding.

Proceedings through June 19, 1968.—Pursuant to the special rules of procedure set forth in our order of March 12, 1968, verified statements (affidavits) were submitted by the railroads in support of the proposed increases, and by protestants in opposition thereto; and opposition was also registered by protests filed in accordance with our General Rules of Practice. At that stage the principal question was whether the increase tariff schedules should be suspended, in whole or in part, pending an investigation into their lawfulness. Briefs directed to this issue were filed by the parties; and on June 13-14, 1968, we heard oral argument.

[595] Since the petitioners intend to make like increases in their rates and charges on intrastate traffic,

1. Most of the increases being considered herein are set forth in the master tariff X-259, as amended; however, some of the provisions, such as restrictions on the application of the master tariff, are contained in agency or individual carriers' rate tariffs.

we notified the several States of the pendency of the proceeding; and, pursuant to section 13(3) of the act, representatives of four State commissions, the Honorable Ralph H. Wickberg of Idaho, the Honorable Charles J. Fain of Missouri, the Honorable Vernon B. Derrickson of Delaware, and the Honorable Edward L. Mason of Florida, sat with us throughout the oral argument. We have had the benefit of their counsel, both at that time and in connection with the conclusions reached herein.

Upon careful consideration of the matters presented by the parties, we concluded to suspend the proposed increases to the extent that they exceeded 3 percent. By order entered June 19, 1968, the proposed increases were suspended until January 24, 1969; but the respondents were permitted, on not less than 1 day's notice, to increase their rates not to exceed 3 percent (except for the disposition of fractions) subject to maximums no higher than those suspended and in no event to produce a greater revenue than that proposed in the X-259 tariff. The order also instituted an investigation of the proposed and the permissive increases. The respondents then filed a master increase tariff, "X-259-A," establishing the increases authorized in the order of June 19, 1968, which tariff became effective June 24, 1968.

Investigation proceedings.—The investigation was conducted under the special rules of procedure set forth in our order entered July 3, 1968. For the purpose of receiving evidence and argument with respect thereto we assigned the following sub-numbers to the tariff schedules and issues involved herein:

Sub-No. 2, railroad cost and revenue need;

Sub-No. 3, coal, tariff items 1065, 1070, 1075, 1080, 1085, 1090, 1095, 1100;

Sub-No. 4, iron and steel scrap, pig iron, iron ore, tariff items 845, 1060;

Sub-No. 5, grain, sugar beets and cane, sugar, molasses, flour, coffee, bakery products, tariff items 515, 520, 525, 560, 570, 580, 675, 680;

Sub-No. 6, accessorial charges, line haul, minimum charges, absorption, transit, tariff items 100, 110, 115, 130, 150, 155, 160, 165, 170, 180;

Sub-No. 7, wood pulp, pulpwood, textile and paper waste, paper, lumber, cotton, textiles, apparel, synthetic fibers, wool, tariff items 500, 505, 510, 690, 695, 700, 705, 710, 715, 720, 725, 900, 925, 970.

Sub-No. 8, farm products, fruits, nuts, meat, canned goods, dairy products, poultry and eggs, starch tapioca, tallow, liquor, tobacco, hides, tariff items 530, 535, 540, 545, 550, 555, 565, 575, 585, 590, 595, 600, 685, 910, 915, 920, 935, 940;

Sub-No. 9, fertilizer, aggregates, limestone, sand, asphalt, potash, shells, cement, brick, clay, lime, chemicals, gases, petroleum products, acids, pulp [596] mill byproducts, paint, drugs, soap, latex, tires, tariff items 605, 610, 625, 630, 635 640, 645, 655, 660, 730, 740, 745, 750, 755, 760, 765, 770, 775, 780, 785, 790, 795, 800, 805, 810, 815, 820, 825, 830, 835, 950, 975, 980, 985, 990, 1020 (shells);

Sub-No. 10, miscellaneous ores, metal products, batteries, nonferrous scrap, salt, radioactive materials, sulphur, phosphates, tariff items 615, 620, 650, 665, 670, 735, 840, 865, 1000; and

Sub-No. 11, metal castings, iron and steel products, pipe, machinery, household appliances, vehicles, instruments and parts, furniture, fixtures, tiles, miscellaneous manufactured items, guns, ammunition, glass, abrasives, marine products,

et cetera; tariff items 850, 855, 860, 870, 875, 880, 885, 890, 895, 905, 930, 945, 955, 960, 965, 995, 1005, 1010, 1015, 1020 (except shells), 1025, 1030, 1035, 1040, 1045, 1050, 1055.

Four hearing examiners were assigned to conduct hearings which were held in Washington, D. C., starting September 9, 1968, and concluding October 8, 1968. The hearings were devoted mainly to cross-examination of respondents' witnesses and the introduction of some rebuttal evidence. Briefs directed to respondents' cost and revenue need and to the lawfulness of the tariff schedules under investigation were filed on or before November 12, 1968. As stated in our order of July 3, 1968, and as contemplated in section 15(7) of the act, this proceeding will not be the subject of an examiner's report and recommended order because due and timely execution of our functions requires an expedited decision. In this interim report we shall deal primarily, but not exclusively, with respondents' cost and revenue needs, which were the subject of the Sub-No. 2 hearing.

Petition to vacate suspension.—The Sub-No. 2 hearing started September 9, 1968, and concluded September 25, 1968. On the following day, by appropriate petition, respondents requested that we vacate our order of June 19, 1968, insofar as it suspended the proposed increase schedules, and that we permit those increases to become effective without further delay, but subject to the aforementioned refund provision. Numerous protestants, in replies to that petition filed on or before October 16, 1968, urged that it be denied. Several of them, referring to the general brief date of November 12, 1968, asked that action on the petition be deferred, in any event, until we have had opportunity to study the briefs and the record in the

complete proceeding; and this we have done. Our conclusion herein, that respondents are in need of immediate relief, is based upon the entire record, including the evidence and briefs of the parties as well as the described petition and the replies thereto.

[597] *Preliminary rulings.*—One of the above-mentioned replies, filed by the Coal Exporters Association of the United States, Inc., also contained a prayer for affirmative relief, in the form of a motion to cancel the interim X-259-A increase of 3 percent on coal destined for export as authorized by our order of June 19, 1968, and seeking also an order for refund of charges arising pursuant to that increase. Rule 101(e) of the Commission's General Rules of Practice (49 CFR 1100.101(e)) provides that a petition seeking any change in an order of the Commission must be filed within 30 days after the date of service of the order except for good cause shown and upon leave granted. The motion referred to, which was refiled October 21, 1968, does not comply with the rule and may not be considered.

Several protestants renew on brief their objections to certain rulings of the examiner near the close of the Sub-No. 2 hearing, in regard to a pamphlet published by Hayden, Stone Incorporated, members of the New York Stock Exchange, entitled "Railroad Industry Review 1968," dated August 27, 1968. Although not disclosed of record, the review was apparently prepared for Hayden, Stone by or under the direction of two financial analysts, Pierre R. Bretey and Karl Ziebarth. The examiner refused to have the pamphlet marked for identification or to receive it in evidence as a rebuttal exhibit of counsel. The examiner further refused to issue a subpoena to compel

Mr. Bretey to appear and testify. Over the objection of respondents, the examiner allowed protestants to make an offer of proof as to the testimony they expected to adduce through Mr. Bretey. Referring to the pamphlet, protestants' counsel stated:

> This represents the information which is going out to the purchasers of railroad stock. I think this exhibit—or this document is entitled to be admitted simply as showing the attitude of the financial community toward railroad stocks. It has a bearing on whether railroad stocks are or are not accepted by the financial community.

Nowhere is it asserted that Mr. Bretey and his co-author are themselves investors, as distinguished from analysts and advisors to investors. Nor do we have any assurance that Mr. Bretey was the author of the portions of the pamphlet sought to be introduced. Arguing for the admissibility of such "rebuttal evidence," counsel for protestants referred to an explanatory letter sent by the Chairman on August 15, 1968, to all parties of record, and specifically to the following sentence:

> [598] Nor do the proceedings prohibit the presentation of rebuttal evidence by any party under circumstances where in the judgment of the presiding examiner such evidence is appropriate and in rebuttal of new matter.

We have examined the transcript of the proceedings in this connection and find no error in the rulings of the examiner. We concur in his judgment that the proffered evidence was not "appropriate and in rebuttal of new matter." We note that some of the protestants' briefs and replies to respondents' petition to vacate the suspension contain extended

quotations from and numerous references to the pamphlet in question as if the factual assertions therein were competently established of record. These quotations and references are not entitled to consideration and they are stricken.

Increased operating costs.—In our reports in Ex Parte No. 256, *supra*, we reviewed the wage settlements and other cost increases experienced by the railroads since the previous general freight rate increase authorized in Ex Parte No. 223, *Increased Freight Rates*, 1960, 311 I.C.C. 373. As explained in our final report in Ex Parte No. 256, the cost totals alone are not meaningful except in relation to the volume of transportation performed. Accordingly, respondents in this proceeding have computed their unit operating costs by years, starting with 1961; and these are shown, together with comparable revenue data in appendix A hereto. We have checked these data and find them substantially accurate. Gross ton-miles reflect the total number of units of transportation produced and are therefore the most appropriate comprehensive measure of output for this purpose. Total operating expenses (including rents and taxes other than Federal income taxes) per 1,000 gross ton-miles actually decreased from $5.95 in 1961 to $5.58 in 1966, and then turned upward to $5.85 in 1967, as estimated $5.96 in 1968, and $6.05 for the constructive year. The unit-cost level for the constructive year is 8.42 percent above that for 1966. Respondents' constructive year projections are based on their estimated 1968 level of traffic demand (744,203 million revenue ton-miles and 12,792 million revenue passenger-miles) and second-half 1968 wage rates, material prices, and other cost factors in effect for a full 12 months.

Current wage increases, above those submitted by respondents in Ex Parte No. 256, but effective in 1967, include an additional 1 percent for engineers, conductors, shoperafts and train dispatchers; an additional 6 percent for engineers working without [599] firemen; increased car scales for road conductors; and 10 cents per hour for journeymen and mechanics. Further wage increases became effective in 1968, as follows: January 1, 4.3 percent for train dispatchers and 2.5 percent for other nonoperating employees, trainmen, and firemen; April 1, and October 1, 5 cents per hour each for journeymen and mechanics; July 1, 3.5 percent for trainmen, firemen, and all nonoperating employees except shoperafts, 5 percent for engineers, conductors, and shoperafts, and 5 cents per hour for a special fund for clerks. These wage adjustments with increases in fringe benefits and payroll taxes are estimated by respondents on an annualized basis, to aggregate $437.1 million. However, as shown in respondents' exhibits and explained by their principal witness, this total is not intended to represent the extent to which actual labor costs are expected to increase from 1 year to another. For such comparisons we are referred to respondents' condensed income accounts, in which the labor expenses are directly related to the employment level of each year and thus reflect the extent to which rising wage rates are offset by improved productivity.[2]

Respondents' income account tabulations for 1966, 1967, 1968 (partially estimated), and the constructive year (including the proposed increases) are reproduced in appendix B hereto. We have carefully checked these data and find them substantially accurate in all material re-

2. Compare Ex Parte No. 256, 332 I.C.C. 280, 283-288.

spects.[3] The estimates for 1968 and for the constructive year are expanded from returns to questionnaires submitted by accounting, traffic, and other officers of 25 "test carriers" representing approximately 84 percent of all class I railroads in the United States, based on operating revenues. These test carriers constitute, for this purpose, a representative group for the industry as a whole.

This evidence compels the conclusion that the entire adjustment proposed by respondents, if approved and made effective, would fall far short of meeting respondents' revenue need due to increased operating costs. For this purpose, 1966 is adopted as a base year and compared with the constructive year, which embraces all known changes of record. Use of 1966 as a base year is reasonable, and fair to shippers, because it reflects recent experience not complicated by a major rate revision, and the traffic volume is close to the current level. As shown in table 1, below, respondents' operating expenses, rents, and taxes [600] (excluding Federal income taxes) in 1966 totaled $9,422.6 million. Adjusted by territories, as shown in appendix C hereto, for the small differences in the traffic level of the constructive year, these base-year operating costs become $9,331.5 million. For the constructive year, the corresponding figure is $10,132.6 million, reflecting an increase in operating costs of $801.1 million. To this must be added $54.3 million, which represents the increase in respondents' fixed charges and contingent interest. Thus, their need for additional freight revenue, to be derived from both Ex Parte No. 256 and Ex Parte No. 259, to cover their increased expenses, is approximately $855.4 million.

3. Some relatively minor exceptions are discussed later in this report.

[601] TABLE 1

Operating expenses, rents, taxes and fixed charges (excluding Federal income taxes)

	1966	Constructive Year	Increase	
		(millions)		
Operating expenses	$8,117.7	$ 8,594.0		
Equipment and joint facility rents	522.8	649.2		
Taxes	968.4	1,025.0		
	9,608.9	10,269.1		
Less Federal income taxes	186.3	136.5		
Total operating expenses	9,422.6			
Adjusted for constructive year volume	9,331.5	10,132.6	$801.1	8.58%
Fixed charges and interest	463.5	517.8	54.3	
Total, expenses and charges	9,795.0	10,650.4	855.4	8.73%

[602] It will be noted that the increase of 8.58 percent shown in table 1 is consistent with and confirms the increase in the unit-cost level previously referred to. With the inclusion of fixed charges, which have risen more rapidly than the other expense items, the increase above the 1966 cost level is 8.73 percent.

The Ex Parte No. 256 rate increases, at the constructive year traffic level, should be generating approximately $300 million in increased freight revenue, which leaves $555.4 million in increased expenses to be met by the Ex Parte No. 259 increases its rates and charges. Respondents estimate that the 3-percent interim increase authorized by our order of June 19, 1968, will produce $265 million in annual

revenue and that, if all of their proposed increases become effective, they will produce some $200 million in additional revenue, or an aggregate of $466.2 million. Protestants' attack on this estimate is not that it is understated but that, because the rate increases tend to cause diversion of traffic, the total revenue generated will be somewhat less. Approval of the entire rate adjustment would thus leave respondents short by at least $89.2 million of annual revenue needed simply to cover their increased expenses.

In the foregoing discussion we have given no consideration to the claim that respondents' revenues from passenger, mail, express, and "all other" services will have declined since 1966 by about $300 million, nor to the time lag usually experienced in establishing like increases on intrastate freight traffic.[4]

Conclusion as to immediate revenue need.—We conclude that respondents are in immediate need of additional freight revenue to offset, in part, their increased operating expenses, including fixed charges and contingent interest, and that our order of June 19, 1968, insofar as it suspended the operation of the proposal increase schedules, except in the limited respects hereinafter discussed, should be vacated.

Rate of return.—Since, as already indicated, our present decision rests upon other grounds, we shall not dwell at length upon respondents' rate of return and net investment. However, in view of the attention devoted to these subjects in the briefs, we deem it appropriate to clarify the situation in certain respects.

In keeping with their practice in prior general revenue proceedings, respondents submitted an orthodox cost-of-

4. Cf. *Increased Freight Rates, E. and W. Territories, 1956*, 299 I.C.C. 429, 436.

capital study through a qualified expert witness, who concluded that, on respondents' net investment as determined by the Commission, a reasonable rate of return would be 9 or 9½ percent. It being apparent [603] that respondents could not possibly achieve such a rate of return at the level of rates here proposed, the presiding examiner inquired whether the recommended rate of return was not, for all practical purposes in this proceeding, an academic concept. The answer, quoted in part in one of the briefs, was as follows:

> Well, I would say it is with reference to your need for computing the total revenues that you think the railroads ought to have. In that sense it is. But it is not an academic concept for the purpose of comparing what the railroads are actually earning compared to what would be fair in making your determination whether any given set of rates is fair and reasonable.

The first part of the witness' answer comports with our observation in Ex Parte No. 206, *Increased Freight Rates, E., W., and S. Territories, 1956*, 300 I.C.C. 633, 662, "***that there is no statutory requirement or statement of policy requiring the making of rates to yield a certain rate of return on investment either in the United States as a whole, or in the various rate territories." In other words, as argued on brief by several protestants, rate of return is not a statutory standard. We agree.

The second part of the witness' answer relates to the zone of reasonableness. In the event that the revenue at a given rate level were to yield a rate of return in excess of 9½ percent, such a rate level, presumably, would not be just and reasonable to the public. The converse, however,

is not necessarily true; a rate of return of 9 percent or less does not automatically place the rate level in the zone of reasonableness; but a rate of return in the range of 4 percent or less, which we have repeatedly characterized as substandard, is at least an indication that the underlying rate level is within the zone of reasonableness.

As calculated by respondents on the same basis as in previous cases, their rates of return, by districts and for the United States, in recent years and for the constructive year (with the proposed increases), are as shown in table 2, below; and they are clearly inadequate.

TABLE 2

Rates of return on net investment

	1966	1967	1968*	Constructive year*
		(percent)		
Eastern District	3.55	1.58	1.77	2.37
Southern District	4.45	3.86	3.65	4.36
Western District	4.03	2.75	2.93	3.35
United States	3.90	2.45	2.58	3.12

*Estimated

[604] Some criticism is leveled at the above rates of return because some railroads have included, in their charges against net railway operating income, Federal income taxes on income from non-railroad sources. In Ex Parte No. 206, *supra*, at 656, we said in regard to a similar contention:

> We agree with protestants that this sum should not be included in computing net railway operating income for purposes of determining a rate of return. However, the percentage relation which this amount

bears to the total value of property used in common carrier service is so small that it would have only a very slight effect upon the rate of return.

Examination of the income accounts for those railroads which in 1967 had the largest amounts of nonoperating income discloses that the indicated correction of their reports would result in raising the rates of return in table 2 by not more than 0.01 percent. The criticism is valid but not of significant importance in this proceeding.

Net investment.—Some of the protestants contend that respondents' net investment is overstated, and that if it were reduced, obviously, the calculated rates of return would be more favorable.

We agree, as a matter of principle, with protestants' contention that the balances in account 80, Other Elements of Investment, and account 90, Construction Work in Progress, should be excluded from respondents' net investment for purposes of calculating their rate of return. Prior to 1963, bases for determining the rates of return for railroads were prepared from valuation records maintained by the Commission. These records reflected the original cost of carrier property as found for valuation purposes, appropriately corrected for additions and retirements as reported by the carriers in their annual reports of property changes. During the years that the Commission maintained these records, the cost of construction work in progress was not included as carrier operating property, such cost being allowable only after such property was actually dedicated to public service. See *Illinois Central R. Co.*, 46 Val. Rep. 1, 39-40. By order entered April 17, 1963, we required the railroads to record in their property accounts the original cost bal-

ances contained in the Commission's valuation records. The resulting differences, debit or credit, were recorded in account 80, a new account established for that purpose. At the same time there was established a new account (90) for construction work in progress. Accordingly, the two accounts represent (1) unsupportable items not includible in cost of property, [605] and (2) costs applicable to items of property not in transportation service at date of financial statement. In the circumstances, carriers are not entitled to a return on such amounts; consequently, the balances in these two accounts should be excluded. The effect of these corrections would be to raise the rates of return shown in table 2 by not more than 0.05 percent.

Various additional contentions of protestants regarding respondents' net investments have been examined and found to be without substance. Some of those most vigorously urged are restated below with our comments.

(1) *Contention.*—That land values and improvements in place in 1916 were inventoried at the 1910-1914 reproduction cost which was used as a beginning point for the current investment in railroad property, thereby overstating the net investment by the increased values of land and properties accruing between 1840 and 1914.

Comment.—In determining the valuation of railroads, it was found that the average prices that prevailed between 1910 and 1914 for other than land, represented, by and large, the average reproduction cost of railroads; and, in the absence of actual cost which was undeterminable, this index was applied as a beginning base for what later became known as "original cost" of railroad property, other than land. This base was perpetuated through sep-

arate reporting requirements until 1963, when, as above explained, we required the railroads to adopt the original cost balances as carried by the Commission in their investment accounts, with the differences, if any, being recorded in the new account 80. Additionally, over the years approximately 70 percent of the "original cost dollars" that was established to represent the cost of the railroad property at the date of basic valuations has been written off as a result of retirements of such property. Consequently, this large percentage of estimated original cost has been replaced by the *actual* cost of property which has been added subsequent to the date of basic valuations. The appraised value of land was never placed on the railroads' books but was used as part of the rate base in Commission proceedings prior to the year 1964. Upon adjustment of the railroad accounts as aforementioned, the railroads were required to place in their land account the actual cost of land, estimated in part. Such actual cost is used as part of the net investment in the instant proceeding.

[606] (2) *Contention.*—That, for many years after the Commission's valuation of properties, many railroads capitalized maintenance expenses, thus further inflating the investment base.

Comment.—There is no responsible basis for such an allegation. Our prescribed accounting rules specifically prohibit the capitalization of expenses. Furthermore, subsequent to the valuation of railroad properties the Commission maintained a large force of valuation field auditors that closely scrutinized railroad property records for proper recording of all additions and betterments; and

this procedure is still followed in connection with our current examinations of railroad accounts and records.

(3) *Contention.*—That until 1943 the railroads were not required to record depreciation for road property, thereby contributing to the inflation of the present net investment.

Comment. While it is true that railroads were not required to record depreciation for road property until 1943 there are offsetting factors that should be considered in evaluating the adequacy of the accrued depreciation for road property; and, on balance, we do not believe that the present net investments are overstated for the reason indicated. There is, of course, no question whatsoever as to the adequacy of the depreciation reserves for equipment accounts.[5] In this connection, among other things, consideration has been given to the following:

(a) Many railroads have gone through reorganization. In each instance, when approving the opening entries for the reorganized railroad, we have required the railroad to establish a depreciation reserve considered adequate at the time for past accrued depreciation on road property.

(b) When railroads' accounts were adjusted in 1963 to record the "original cost" of property in their primary accounts, in instances when the adjustment created a credit balance in account 80, we permitted the railroads, upon application, to transfer an appropriate portion of such credit balance to depreciation reserve accounts for road property to the extent necessary to offset any under-accruals as at that time.

5. Cf. *Increased Freight Rates, E., W., and S. Territories, 1956, supra*, at 656-657.

(c) Depreciation accounting is not prescribed for the "track structure" which includes crossties, rails, track material, ballast, and labor. The use of "betterment" accounting for rail results in the investment account balance showing a far lesser amount [607] (probably as much 50 percent) than the actual cost of the rail that is in the track structure today. Crossties, in the carriers' accounts, have remained static in the amount that was recorded per tie at time of the initial valuation. This cost per tie ranges between 30 to 50 cents. If the tie account were restated today to reflect the actual cost of the ties that are in the track structure, the investment accounts would be increased over $1 billion.

(4) *Contention.*—That, in the case of a railroad reorganization, the net investment of the predecessor company has been continued on the books of the reorganized company; and further, that where one railroad acquires another for less than its book value the net investment of the railroad acquired is entered on the books of its new owner the same as on the books of the old company.

Comment.—These statements are basically true with respect to transactions occurring in past years. It should be clarified, however, with respect to reorganized companies, that we have required the reorganized company to adopt in its primary property accounts the "original cost" as determined by the Commission at the time of the carrier's basic valuation, brought forward to the date of the transaction, in lieu of using the actual account balances reflected on the predecessor company's ledger. In many instances this adjustment of the accounts has actually resulted in a writedown of property account balances. The

use of this procedure perpetuates for investment account purposes the cost of property at the time it was first dedicated to public service.

Statutory standards.—The present inquiry into respondents' cost and revenue need must be conducted in the light of the standards set forth in the Interstate Commerce Act. The rule of ratemaking, section 15a(2), provides:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

In testing, first, whether the proposed rates will move the traffic, we reserve for further consideration in Sub-Nos. 3-11 such questions as discrimination, preference, and prejudice. The question at hand relates to the general freight rate level—are the proposed rates so unreasonably high as to be self-defeating? We [608] think not. As shown in appendix D hereto, the carload freight rate level has declined from the peak reached in 1958, while consumer and wholesale prices have steadily trended upward. Since the Ex Parte No. 223 increase the carload freight rate index (1950=100) declined from 114 in 1961 to 104 in 1966. Referring again to appendix A, respondents' average operating revenue per 1,000 gross ton-miles declined from $6.50 in 1961 to $6.30 in 1967. If all of the

proposed increases are made effective, the latter average, for the constructive year will become $6.65. We agree with the judgment of respondents' traffic officers that the contemplated rate level would have no material adverse affect on the movement of traffic. We have previously found that respondents are in need of the additional freight revenue here sought to offset, in part, their increased operating expenses, including fixed charges and contingent interest. We conclude that the proposed rate level, generally speaking, is within the zone of reasonableness, where management is accorded substantial freedom in service pricing. This conclusion, we emphasize, is not a prejudgment of the issues in Sub-Nos. 3-11.

Exceptions.—Our conclusions as to the issues in Sub-Nos. 3-11 will be the subject of a separate and final report, which will embrace all of the tariff schedules under investigation, and will result in automatic refunds to shippers to the extent the proposed rates and charges are found unlawful. Our order herein, by permitting most of the proposed rates and charges to become effective at this time, will provide substantial immediate relief to respondents. We are, however, excepting from the scope of our order, and are retaining under suspension pending further consideration in Sub-Nos. 4 and 5, master tariff item 845, pig iron and iron and steel scrap and item 515, grain and grain products. The authority contained in our order of June 19, 1968, to increase respondents' rates 3 percent (subject to stated maximums) will be continued in force in regard to these two items.

FINDINGS

We find:

1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the

increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation [609] system will be adversely affected unless the proposed increased interstate freight rates and charges, with the exceptions noted in our order, are permitted to become effective at this time.

2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

3. The increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges. This finding, however, is without prejudice to other or different findings to be reached in Sub-Nos. 3-11 in regard to particular rates and charges.

4. All of the tariff schedules under investigation, including those herein permitted to become effective, are subject to an automatic refund provision; and, with the other remedial provisions of the act, the shipping public in general is reasonably protected. On the other hand, withholding of the authority herein authorized would result in irreparable injury to respondents and would be contrary to the public interest.

5. Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including

typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act.

An appropriate order will be entered, including such modification of our outstanding orders and granting such forth-section relief as may be necessary to permit the suspended schedules to become effective, to the extent indicated herein, on 1 day's notice, pending further order of the Commission.

I.C.C.'s Interim Decision

[610] APPENDIX A

UNIT COSTS AND UNIT REVENUES

Railroads of Class I in the United States

Year	Gross ton-miles excluding locomotives (billions)	Total operating expenses[a] (millions)	Total operating revenues (millions)	Average per 1,000 gross ton-miles	
				Expenses[a]	Revenues
	1	2	3	4	5
1961	1,413.0	$8,408.9	$9,189.1	$5.95	$6.50
1962	1,459.9	8,557.4	9,439.9	5.86	6.47
1963	1,499.7	8,589.8	9,559.5	5.73	6.37
1964	1,557.6	8,900.4	9,856.5	5.71	6.33
1965	1,608.7	9,082.7	10,207.8	5.65	6.35
1966	1,688.6	9,422.5	10,654.7	5.58	6.31
1967	1,645.3	9,622.2	10,366.0	5.85	6.30
1968[e]	1,675.5	9,987.5	10,799.8	5.96	6.45
C.Y.	1,675.1	10,132.6	11,136.5	6.05	6.65

a — Includes operating rents and taxes other than Federal income taxes.

e — Estimated.

C.Y. — Constructive year with proposed rate increases.

TRAFFIC, EMPLOYMENT AND CONDENSED INCOME ACCOUNT

Railroads of class I in the United States

Line No.	Item	1966	1967	1968	Constructive year
	1	2	3	4	5
			millions		
1.	Revenue ton-miles	$ 738,395	$ 719,755	$ 744,470	$ 744,203
2.	Revenue passenger-miles	17,085	15,201	12,792	12,792
3.	Gross ton-miles, freight and passenger service, excluding locomotives	1,688,642	1,645,274	1,675,453	1,675,135
4.	Average number of employees	630,895[1]	610,192[1]	589,591[1]	592,322[1]
5.	Net investment	26,820.4	27,628.8	27,817.3	27,817.3
6.	Operating revenues—total	10,654.7	10,366.0	10,799.8	11,136.5
7.	Freight	9,280.6	9,130.2	9,725.0	10,052.3
8.	Passenger	543.6	485.4	416.6	417.5
9.	Mail	304.0	263.6	195.9	195.2
10.	Express	67.3	60.7	43.7	44.1
11.	All other	459.1	426.1	419.5	427.4
12.	Operating expenses—total	8,117.7	8,203.3	8,460.0	8,594.0
13.	Wages charged to expenses	4,605.8	4,639.5	4,795.9	4,893.1
14.	Depreciation and retirements	744.8	763.9	785.0	787.8
15.	Other expenses	2,767.1	2,799.9	2,879.1	2,913.1
16.	Taxes—total	968.4	910.5	973.4	1,025.9
17.	Payroll	439.1	477.2	508.0	515.8
18.	Federal income	186.3	66.5	94.4	136.5
19.	Other	343.0	366.7	371.0	373.6
20.	Equipment and joint facility rents net dr.	522.8	574.9	648.5	649.2
21.	Net railway operating income	1,045.9	677.4	717.9	867.4
22.	Rate of return (line 21 ÷ 5) percent	3.90	2.45	2.58	3.12
23.	Other income	399.5	457.5	427.0	420.1
24.	Miscellaneous deductions	78.1	84.3	85.0	83.6
25.	Fixed charges and other deductions	463.5	495.9	517.7	517.8
26.	Ordinary income	903.8	554.7	542.2	686.1

[1]—Whole numbers.

Operating expenses, rents, taxes and fixed charges (excluding Federal income taxes)

	Eastern district		Southern district		Western district	
	1966	Constructive year	1966	Constructive year	1966	Constructive year
			millions			
Operating expenses	$3,240.3	$3,396.7	$1,205.7	$1,328.3	$3,671.6	$3,869.6
Equipment and joint facility rents	245.2	335.9	79.6	92.8	197.9	220.5
Taxes	340.9	381.1	144.3	161.3	483.2	483.5
	3,826.4	4,113.7	1,429.6	1,582.4	4,352.7	4,573.0
Less Federal income tax	41.6	39.7	27.6	28.6	117.1	68.2
Total operating costs	3,784.8	4,074.0	1,402.0	1,553.8	4,235.6	4,504.8
Gross ton-miles	583,968	569,957	280,349	283,749	824,325	821,429
Ratio, constructive year/1966	1.000	0.976	1.000	1.012	1.000	0.996
1966 costs at constructive year volume	3,694.0		1,418.8		4,218.7	
Fixed charges, contingent interest	222.6	244.4	76.6	88.9	164.3	184.5
Total operating expenses and fixed charges	3,916.6	4,318.4	1,495.4	1,642.7	4,383.0	4,689.3
Increase over 1966		401.8		147.3		306.3
Percent increase		10.26		9.85		6.99

[614] APPENDIX D

Comparison of BLS consumer price and wholesale price indexes with I.C.C. index of railroad construction costs and freight rate indexes

Year	Consumer price	Wholesale price	Annual railroad construction costs	Railroad carload freight rates
	1950=100			
1947	92.8	93.5	89.6	80
1948	100.0	101.3	98.3	93
1949	99.0	96.2	98.6	99
1950	100.0	100.0	100.0	100
1951	108.0	111.4	106.2	102
1952	110.4	108.3	109.4	109
1953	111.2	106.8	113.2	111
1954	111.7	107.0	113.9	109
1955	111.3	107.4	116.7	108
1956	113.0	110.8	125.7	112
1957	116.9	114.1	132.3	118
1958	120.2	115.7	135.4	121
1959	121.1	115.9	138.2	118
1960	123.0	116.0	138.5	116
1961	124.3	115.6	137.8	114
1962	125.8	115.9	137.5	112
1963	127.3	115.6	137.2	109
1964	129.0	115.8	137.2	107
1965	131.1	118.1	137.8	105
1966	134.9	122.0	140.3	104
1967	138.7	122.2	N.A.	105p

p—preliminary

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 259

INCREASED FREIGHT RATES, 1968

FINAL REPORT AND ORDER

[714] Ex Parte No. 259

INCREASED FREIGHT RATES, 1968

Decided January 9, 1969

Proposed increases in railroad freight rates and charges intraterritorially within eastern, western, and southern territories, and interterritorially between such territories found just and reasonable except as specifically provided herein. Appropriate order entered, including such modification of our outstanding orders and fourth and sixth section relief as may be necessary to permit the increases approved to be established and maintained.

Appearances as shown in prior report.

Additional appearances: *W. R. Humphrey, Jr., S. J. Jablonski,* and *Gerald E. Stitt* for protestants.

I.C.C. Final Order

REPORT OF THE COMMISSION

BY THE COMMISSION:

Our prior report in this proceeding, decided November 25, 1968, (332 I.C.C. 590), concerned primarily the issue of the increased operating costs of the railroad respondents and the extent to which a need for increased revenues had been proved. We there found that the respondents had established the need for additional revenue at least as great as that sought by the proposed increases in their rates and charges, and partially vacated our order of June 19, 1968 which suspended operation of the schedules of proposed increases, but permitted an increase of 3 percent to become effective pending the outcome of this proceeding. The proceeding was continued for the consideration of the lawfulness of the proposed and interim increases as they applied to specific commodities and services, and of the evidence and arguments of all parties with respect thereto. The procedural history of the case is set forth in our prior report and will not be repeated. Our findings as to increased railroad operating costs and revenue need, as set forth and explained therein, are adopted and made part of this report as though fully restated. Those findings, together with the [715] further findings made in this report, constitute the basis for our ultimate conclusions and order herein.

The proposed increases vary from 3 to 10 percent, or by specific amounts generally within that range. Many protestants object to this approach contending that it is productive of discriminations. The higher increases on certain commodities or services, however, stem from recognition by the respondents of the extent to which rates on those commodities or services can be increased without

producing substantial loss of traffic to competing forms of transportation or substantial reduction in the volume of traffic. Where lesser increases apply they reflect a determination by the respondents that any greater amount would not, at this time, result in increased revenues. While a single percentage increase has the appearance of uniformity and nondiscriminatory treatment of shippers, we have indicated in the past the need for a more selective approach. Even where uniform increases have been approved, competitive conditions have quickly required the carriers to make revisions with respect to specific commodities in order to retain traffic. The consequence has been, within a short time, an increased rate structure as varying as here proposed.

Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed. We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370.

The Manufacturing Chemists' Association asserts that the additional revenue to be derived from chemical traffic under the proposed increases is excessive and out of proportion to the volume of chemical traffic. Other protestants have called attention to similar conditions with respect to their traffic, and to the fact that in particular rate tariffs, various railroads have flagged out of the in-

creases on various commodities in whole or in part. The contention is made that the respondents are assessing an unreasonable proportion of the increased revenue need upon some industries while failing to assess a reasonable proportion upon others. That different commodities or services make varying [716] contributions to net revenue is well recognized. *Sugarcane From South Florida to Clewiston, Fla.*, 281 I.C.C. 47, 63. Our authority under section 15(1) in respect to rates rests upon a finding that the proposed rate is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of the Interstate Commerce Act. The criteria provided by the statute, including those set forth in section 15a(2), do not comprehend consideration of the extent to which the overall movements of particular commodities contribute to net carrier revenue in a proceeding of this nature. We are concerned with the lawfulness of the increased rates and charges applicable to the various commodities and services; the effect of such increases on the movement of traffic; the need, in the public interest, for adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and the need for revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

One of the primary contentions made by protestants is that the increases will result either in drying up movement of particular commodities or diversion of the traffic to competing forms of transportation, to such an extent that there will be no actual revenue increase produced. They seek to have us apply the criteria set forth in section 15a(2) of the act and bar the increases on the ground that they would be self-defeating. The respondents assert

that such consequences will not ensue. While we shall refer to certain of these arguments hereinafter in connection with specific commodities, we observe at the outset that predictions of this nature are always diametrically opposed in rate increase cases and must be treated as having limited probative value. For these reasons, denial of rate increases for which need has been established would require evidential support more reliable and persuasive than has been provided in this record.

A number of protestants submitted studies showing costs and revenues for the transportation of particular commodities or types of traffic. It is contended that revenues from present rates, without the increases, now exceed out-of-pocket costs, and, in many instances, fully-distributed costs, by substantial margins. Increases, it is argued, are not justified in such cases. A related contention is that the respondents have failed to show that the increases in operating costs directly related to the transportation of specific commodities are proportional to the rate increase proposed for such commodities. Neither of these contentions is [717] sufficient to warrant denial of the increases. It is clear that rates substantially in excess of full costs do not necessarily exceed a maximum reasonable level. *General Motors Corp.* v. *New York Central R. Co.*, 311 I.C.C. 622, 625. Additional revenue required to meet increased operating costs and fixed charges must be obtained from all traffic insofar as possible, whether or not specific traffic is profitable, or contributes more or less revenue, or incurs more or less costs than other traffic. Costs of specific commodity movements are not in issue. See *Increased Freight Rates, E., W., and S. Territories, 1956*, 300 I.C.C. 633, 676. Our admonition in *Increased Freight Rates, 1967*, 332 I.C.C. 280, 285, respecting a study of the

unit costs of performing transportation services did not contemplate detailed, individual studies of particular traffic movements. The compilation, presentation, and evaluation of data in such massive proportions, as urged by protestants, would make impossible the effective prosecution of our regulatory function, and is not required by the Interstate Commerce Act. *United States* v. *Louisiana*, 290 U. S. 70, 76.

Commodity grouping.—On March 7, 1968, the respondents issued a publication entitled Standard Transportation Commodity Code Tariff No. 1 (STCC), effective April 16, 1968, which consisted of a listing of commodities arranged as follows. The code numbers were assigned in general groupings, each designated by a two-digit number from 01 to 42. Subgroupings of commodities within the general groups were assigned numbers containing additional digits up to a maximum of five, preceded by the general group numbers, the arrangement being such that any particular code number includes all commodities more specifically coded with that number than under a heading of fewer digits. Thus for example:

Code 23	Apparel; AAO. Other Finished Textile Products or Knit Apparel.
23 1	Mens, Youths or Boys Clothing; aao. uniforms exc. leather or sheep lined, or raincoats see 238
23 11	Mens, Youths or Boys Clothing; aao. uniforms exc. leather or sheep lined see 2386 or raincoats see 2385
23 111	Mens, Youths or Boys Clothing; aao. uniforms exc. leather or sheep lined see 23861 or raincoats see 23851
23 111 10	Blazers, wool
23 111 50	Lumberjacks, cotton or cotton and wool

[718]

23 3	Women's Misses or Childrens Clothing; aao. infants exc. fur see 237, raincoats see 238 or surgical see 384
23 5	Caps, Hats or Millinery; aao. hat bodies exc. fur see 237

(aao—also applies on)
(exc—except)

Tariff X-259, here in issue, grouped the commodities to which the proposed rate increases applied under separate tariff item numbers but, by use of the Standard Transportation Commodity Code numbers referred to above, made the increases applicable to numerous commodities included within the code groupings. This was accomplished by listing the most general group number and commodity description in the increase tariff. Thus, for example, Item 660 of the tariff provides an increase on STCC 14 716 *Sulphur, crude, liquid, molten or solid.* Reference to STCC Tariff No. 1 shows that Code 14 716 includes as subgroups the following items:

14 716 10	Sulphur (brimstone), ot crude
14 716 15	Sulphur (brimstone), crude aao. sulphur rock or sulphur balls
14 716 20	Sulphur, liquid or molten
14 716 30	Sulphur residue

(ot—other than)

Some of the protestants have challenged this method of tariff publication as unnecessarily intricate and productive

of confusion. We are satisfied, however, that it is a worthwhile step toward the eventual simplification of tariffs and may, with appropriate development and refinement, lead to application of automatic data processing procedures in determining rates. It is also contended that, in certain instances, the grouping of commodities in tariff X-259 by use of the STCC code numbers disrupted relationships in rates between commodities which, for competitive or other reasons, have historically been accorded similar rates and rate [719] adjustments. In some instances, the respondents have acknowledged that revisions of the tariff are appropriate to retain such relationships. These are considered in this report as they arise in connection with our discussion of the involved commodities. The respondents will be expected to give careful consideration to other such instances when discovered or brought to their attention and to make such revisions as are warranted.

A number of protestants have called attention to the fact that tariff X-259, in referring to the Standard Transportation Commodity Code, identifies it only by reference to the publication of the Traffic Executive Association—Eastern Railroads, Agent, I.C.C. C-686. It is argued that, since this publishing agent acts only for eastern railroads, all other railroads (except in joint-line haul situations) are without authority to employ the master increase tariff X-259 by reference to the commodity groupings in the code. We consider this contention lacking in merit. Reference in the master tariff to the publication of the code by one of the agents is sufficient.

Commodities generally.—Respondents propose to increase their class rates by 5 percent. On commodity and exceptions rates, in those instances where specific carload rate increases are not published, the proposed increase

is 6 percent. Only new, sporadic, or light and bulky traffic moves at carload class rates and only a few class I railroads offer unrestricted less-than-carload service. The respondents also propose to increase their per-car minimum charges for line-haul service 5 percent between and within southern and western territories, excluding some destinations on The Chesapeake and Ohio Railway Company. There is no substantial evidence in opposition to these increases. The class I railroads in 1966 incurred a deficit of more than $100 million in handling less-than-carload traffic. We are of the opinion that the proposed increases of the foregoing rates and charges will be just and reasonable.

Accessorial services.—Respondents propose to increase accessorial service charges 6 percent with various exceptions. For example, charges for split delivery, loading, or unloading are increased 5 cents per 100 pounds or $1 a ton, except that in eastern territory the charges would be increased 6 percent, and a $3 minimum increase is provided in some instances. Certain of the protestants who must use the railroads' services pay substantial sums for accessorial services and they claim that the increases in such charges are excessive or discriminatory.

[720] The charges for accessorial services were increased between 1960 and 1967; thus the respondents did not forego such increases as they did in connection with their line-haul rates. Nevertheless, respondents' evidence shows that their territorial average out-of-pocket costs of providing accessorial services generally exceed the charges made for these services. Since this proceeding is to determine the lawfulness of the proposed increases, rather than inequities in particular charges, individual cost studies at the numerous locations were not required.

Different accessorial charges are provided for like services on different commodities or at different localities. Thus, higher transit charges are applied on lard or shortening than on canned goods; and transit charges at Chicago, Ill., are maintained per 100 pounds, which results in greater charges for large shipments than charges stated per unit other than weight. Some protestants argue that the lower charges should be increased to cover more of respondents' costs, and that the higher charges should not be increased or should be increased by lesser amounts. Numerous protestants, on the other hand, object to the higher percentage increases in the lower charges which result from use of the $3 minimum. We conclude that the increases in the accessorial service charges are within the zone of reasonableness and that merely showing that they are on relatively different levels does not establish that they are unlawful.

Trailer-on-flatcar (TOFC.)—The respondents propose a 6 percent increase in rates and charges for TOFC service, except for ramp-to-ramp service and where specific increases are provided for carload commodity and exceptions rates. The charges for ramp-to-ramp TOFC service would be increased 6 percent between and within eastern and western territories, but 3 percent from, to, and within southern territory. The Virginia State Ports Authority, The North Atlantic Ports Association, Inc., and the Port of New York Authority oppose the increase for ramp-to-ramp service, asserting that it would disturb port rate relationships and cause a substantial diversion of import and export traffic to South Atlantic and Gulf ports; but they have not referred to specific port relationships prescribed by us which will be disturbed by the proposed increases. In the event a prescribed basis is disturbed, the respondents will be expected promptly to restore the relationship.

ITOFCA, Inc., a nonprofit association of shippers, opposes the 6 percent increase in detention charges on trailers provided by [721] the railroads for TOFC ramp-to-ramp service. It argues (1) that the present charges are excessive when related to the railroads' investment in trailers, the interest on the investment, and the cost of maintenance and (2) that the trailer detention charge is excessive when related to the demurrage charge on a like shipment in boxcars, for which no increase is proposed. In this type of TOFC service the shipper or receiver arranges for the drayage of the trailer between its plant and the railroad's ramp. The shipper or receiver, or his agent, the drayman, has possession of, and can use, the trailer, whereas a boxcar remain on the rail siding and has little use except for possible storage. Thus, trailer detention charges and boxcar demurrage charges cover unrelated services. The detention charge, moreover, may be avoided by promptly returning the trailer to the railroads. We see no reason why this service should not bear a portion of the railroads' increased operating costs and we find no unlawfulness in the proposed increase in the trailer detention charge.

Switching.—A 6 percent increase is proposed in charges paid by the shipper or receiver for intraplant, intraterminal, and interterminal switching. Evidence in opposition to the increases was offered by petroleum, steel, beer, grain, and other interests. Lukens Steel Company noted that its intraplant switching charge had been increased $5, which amounted to 35 percent, under Ex Parte No. 256. The charges at that level ranged between $19.49 and $23.39 per car. The 6 percent increase sought herein would make a total increase of 41 percent, above the pre-Ex Parte No. 256 level. The official territory out-of-pocket cost, increased to the January 1, 1968 level, for providing this

service is shown as $30.88 in boxcars and $33.59 in other cars.

The members of Western Pennsylvania Refiners Traffic Association have plants in small communities usually on the line of a single carrier, and they require simple switching services. The association argues that the increases will apply to new minimum charges, which were suspended in Investigation and Suspension Docket No. 8404, Switching Charges, Eastern Territory. Although that proceeding was discontinued July 18, 1968, after the suspended increases were canceled, as pointed out by respondents in their brief, the new minimum charges were then published in their switching tariff and became effective September 13, 1968. The association argues that the proposed increases added to those in Ex Parte No. 256 are in excess of any just and reasonable charge for performing the service. Reference is made to present [722] switching charges at Bradford, Pa., of $18.26, $27.47, and $43.48 per car, respectively, for intraplant, interplant (apparently intraterminal), and interterminal switching. Respondents' evidence shows, however, that these charges cover only a little more than one-half of the average out-of-pocket costs in official territory for providing such switching services.

The board of trade of the city of Chicago objects to increases in the switching charges on grain in that area. The charges, stated in cents per 100 pounds, are at a level where the 6 percent increase is rounded to 1 cent, producing a percentage increase in the switching rate of about 9 percent. This protestant contends that a percentage increase in the type of switching charges maintained at Chicago places a greater per-car increase on the

heavier loading commodities and that on a car weighing in excess of 50 tons, the charge would be from 200 to over 300 percent of the out-of-pocket costs. Not all commodities, however, are heavy loading. The protestant also asserts that the switching charges have increased about 60 percent since 1958, whereas the "BLS" consumer price index relied upon by the respondents increased only 17 percent in the same period. In *Switching Rates in Chicago Switching District*, 177 I.C.C. 669 (1931) and later reports, the Commission prescribed the maximum switching rates on all commodities in the Chicago switching area. The present switching charges are on the prescribed basis increased as authorized in other general revenue proceedings and reflect the complicated switching situation at Chicago.

The Granite City Steel Company notes that at East St. Louis, Ill., the switching charges were increased between 4.2 and 18.5 percent in Ex Parte No. 256, and that the additional increases involved herein would extend the increase to between 10.4 and 25.9 percent above the pre-Ex Parte No. 256 level. East St. Louis is a border point assigned the eastern territory increase in Ex Parte No. 256, whereas switching charges in southern territory were not increased and those in western territory were only increased one-half the amount of the flat increase in eastern territory. This protestant seeks to have the proposed increases in switching charges at the East St. Louis switching district canceled to remove a part of the alleged prejudicial treatment suffered by that district under Ex Parte No. 256. While the railroads have often accorded different rate treatment to border points than to interior points, it is not feasible to revise individual rate adjust-

ments in this general revenue proceeding, nor is there evidence sufficient to find the proposed increases at East St. Louis unlawful.

[723] The Institute of Scrap Iron and Steel urges that the proposed increases will further hamper the rail movement of iron and steel scrap. Unregulated motor carriers now transport iron and steel scrap to the processing yards, from which it is sent to dockside for export or to mills for further processing. In order to dispose of the vast amount of iron and steel scrap some of it must be exported. However, the market is depressed and the protestant argues that increased switching charges will encourage foreign users to obtain their needs elsewhere or to switch to iron ore. The respondents' switching costs at the ports have increased the same as at other points, and the railroads cannot be expected to transport export traffic at less than out-of-pocket costs. No reason is shown why the iron and steel scrap industry should be excused from bearing a part of the increases in rail costs.

In view of the evidence of record, we conclude that the increases proposed in switching charges are just and reasonable and not shown to be unlawful.

Transit.—Respondents propose to increase their transit charges 6 percent and, except in eastern territory, to make the increase subject to a minimum of $3 a car. At most stations in western and southern territories, the minimum transit charge when published per car is to be increased 6 percent, minimum $3 per car. The charge for stopping carload shipments in transit to partially load or unload is to be increased $3 per stop in southern (except for TOFC service and transloading) and western territories. At all other points a 6 percent increase is proposed.

The increases in transit charges are opposed by many interests, including the sugar, flour, edible oil, foodstuffs, rag, and waste industries. The Northern Ohio Sugar Company processes sugar in the last quarter of each year, and in order to supply its customers on a regular basis, places large quantities of sugar in public storage. The transit charge of 6.5 cents per 100 pounds, established about 2 years ago would become 7 cents under the proposed increase. This protestant claims that the increases are forcing it to build storage facilities at its factories and to discontinue public storage, which could divert traffic from the railroads.

The Pillsbury Company ships grain and flour by carloads into its warehouses and mixed carloads of grain or flour and foodstuffs from those warehouses. The grain rates include transit, but the foodstuffs rates are subject to transit charges, which vary according to the mixture in the car. The $3 minimum transit charge would apply on the foodstuffs in these mixed shipments and could [724] produce a percentage increase of as much as 61 percent in some instances. Without the transit service, however, the foodstuffs would be charged higher less-than-carload rates.

Franklin Bros. & Co., Inc., which ships rags and textile waste, argues that since in many cases the stopoff charges produce total transportation costs which exceed its margin of profit from the lading, in many instances the traffic will be lost to the railroads. It also asserts that its export shipments of textile waste material through the port of New York, have fallen off because its prices, which must include the extra charges, are not in line with those of foreign competitors. Several protestants object to increases in transit charges on traffic going through the ports. The members of the Western Petroleum Refiners' Association

would have to pay the increased charges at the ports, whereas their competitors located on the waterfront would not have to pay for these services. General Foods Corporation argues that an increase in the split delivery charge of 5 cents per 100 pounds, minimum $1, at Philadelphia, Pa., on imported cocoa beans is inequitable and unreasonable. Virginia State Ports Authority opposes increases in waterborne charges.

A number of special service charges would be increased 6 percent. The Lukens Steel Company objects to increases in addition to those permitted in Ex Parte No. 256, *supra*. The United States Department of Agriculture opposes the increases in charges for supplying grain doors, and for holding cars of grain for inspection and disposition orders. The holding and inspection charge is not applicable at all stations. The board of trade of the city of Chicago objects to the increases in charges (1) for inspecting grain held on inspection tracks after the expiration of free time, and (2) for diversion and reconsignment charge increase. The protestants assert that the increases have not been justified, or result in charges which are out of line with those at other points.

The out-of-pocket costs of providing transit services have increased. In eastern territory, for instance, they were $68.96 as of April 1, 1967 and $72.36 as of January 1, 1968, representing an increase of about 5 percent. The stopping-in-transit charges increased about 5.7 percent in that territory during the same period. Since transit charges as increased will still cover the costs of providing the service, the proposed increases appear to be within the zone of reasonableness.

Minimum line-haul revenue.—In Ex Parte No. 256 the eastern carriers were authorized to increase by one-third

the minimum [725] net line-haul revenue they must receive before absorbing any portion of switching charges. As so increased the minimum amounts ranged generally between $60 and $67 per car. No increases, however, were authorized at St. Louis, Mo. and East St. Louis, Ill., where they were opposed by Granite City Steel Company, and where minimum net line-haul revenue requirements of $49.83 for single-line and $62.74 for joint-line services had recently been established.[1]

Southern territory carriers withdrew from the proposal in Ex Parte No. 256; but they now propose to increase their minimum revenue requirement by one-third at southern territory points and at certain Mississippi River crossings, including St. Louis and East St. Louis. At other points, respondents propose an increase of 6 percent. Granite City Steel Company again opposes the increases at St. Louis and East St. Louis, contending that increases in excess of 6 percent would be out of line and excessive. Respondents argue that in Ex Parte No. 256 we acceded to this protestant's request by treating St. Louis and East St. Louis the same as southern territory; that protestant had made an election to this effect; and that, to be consistent, these points should be given the proposed southern territory increase of 33⅓ percent. We do not consider such argument as justification for higher percentage increases in minimum requirements at St. Louis and East St. Louis than elsewhere in the East. On the other hand, the record affords no factual basis for exact equalization of such minimum requirements. In the circumstances, therefore, we shall limit our authorization in this proceeding to an increase of 6 percent at St. Louis and East St. Louis, leaving respondents free subsequently to

1. See 329 I.C.C. 854, 950.

publish such further modification as they are prepared to justify.

Except as above noted, absent opposing evidence, we find the proposed increases in minimum line-haul revenue requirements justified.

Train service and detention charges.—Westinghouse Electric Corporation, National Electrical Manufacturers Association, and Hydraulic Turbine Manufacturers, in behalf of their members, oppose a 6 percent increase in the special train service charge. Because of the large size and heavy weight of transformers and other commodities which they ship, these protestants often find it necessary to use special train service, the charge for which is in addition to all other charges. In July 1965 the charge was increased from $7.35 to $8.50 per mile. In Ex Parte No. 256, the [726] charge was increased to $8.93 or $9.35 per mile, depending upon the territory. In support of the 6 percent increase the respondents state that at times, because of weight or dimensions, a complete train crew and the necessary motive power are required to handle a particular shipment. On occasion such trains must move over circuitous routes and at reduced speeds. These same protestants oppose the 6 percent increase in the use and detention charges on the heavy flatcars, which are used by electrical manufacturers to move their large, heavy commodities. Demurrage or detention charges applicable to all other types of cars are excluded from the increases in this proceeding. Use and detention charges on heavy-duty flatcars were increased effective June 16, 1968 by 5 and 10 percent but were not otherwise increased in Ex Parte No. 256. The respondents point out that these cars are expensive and, although in continuous use, are underutilized from an annual mileage standpoint. The use charge is to compensate

the respondents for unusually high investments for special rail equipment. But the protestants argue that, as the investment is fixed, it is being offset by the present charge; and there is no justification to increase it. However, replacement costs are constantly increasing; a 700,000-pound car which cost $93,695 in 1961 would cost about $123,000 to replace in 1968. The detention and demurrage charges can be avoided by the prompt release of the heavy-duty flatcars. No reason appears why these services should not bear a portion of the revenue requirements.

Coal.—Bituminous coal is the largest single commodity handled by class I railroads. In 1967, it comprised 24.83 percent of all tons carried and 26.78 percent of all tons originated. Revenue from this traffic constituted 11.91 percent of revenue received on all freight. The respondents estimate that the proposed increase on coal will produce $48 million annually in additional revenues.

In the East, including the Pocahontas region, bituminous coal constituted 38.37 percent of all freight carried in 1967, and 44.18 percent of all freight originated. The greater part of the movement in this area is by rail and it is estimated that the proposed increases will produce increased revenues of about $36 million annually for class I carriers. In 1967, over 68 percent of the bituminous coal produced in the United States moved from origin by rail. Total annual production since 1950 has varied between 390 million tons and 550 million tons, and between 68 and 76 percent has moved by rail. During that period, the average rail rate fluctuated between $3 and $3.58 per ton. These average figures [727] include the rates charged on the numerous volume, unit train, and trainload arrangements which have become more and more common in recent years.

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The respondents propose to increase their rates on bituminous coal (including export coal), anthracite, coke, coal briquets, and petroleum coke briquets 5 percent, maximum 15 cents per ton. On lignite coal and lignite coke the maximum is 7.5 cents. The proposed schedules provide for the usual limitations and provisions for a single increase on coal moving, for example, rail-ocean-rail, and rail-river-rail, and on lake-cargo coal moving beyond the upper Great Lakes docks to interior destinations (8 cents per ton on the first rail leg and 7 cents per ton on the second rail leg). Charges for handling and transferring of coal at lower lake docks are proposed to be increased 6 percent. No increase is proposed in the dumping charges at Hampton Roads, Va., in connection with export coal. The proposed increases are estimated to average about 4.2 percent.

The National Coal Association, other associations, and numerous coal producers, electric utilities, and steel manufacturers, oppose the increases on bituminous coal and on accessorial charges where applicable to coal. It is contended that the proposed increases will result in reduced revenues due to replacement of coal by competitive forms of energy and the diversion of coal traffic to nonrail forms of transportation.

Coal in the East is faced with severe competition from imported residual fuel oil. In 1966, imported oil amounted to 358 million barrels, or the equivalent of about 86 million tons of coal. Residual fuel oil has displaced bituminous coal at 3 major utilities in the East. While displacement was not systemwide, residual fuel oil displaced bituminous coal at 12 plants which burned 3.7 million tons in 1966 before converting. The protestants also contend that coal pipelines and mine-mouth generating plants constitute a serious threat to rail movement of coal in eastern territory.

It is argued that the proposed increases will greatly influence the future planning of utility companies with respect to construction of plants adapted to the use of other types of fuel, such as nuclear energy, oil, and gas. Some of the protestants' existing plants are equipped to burn either coal or gas and further increases in the delivered cost of coal, it is asserted, would induce conversion of other plants. According to protestants, during the period 1965-67 electric generating companies placed orders for nuclear plants aggregating about 30 million kilowatts, which [728] will displace approximately 85 million tons of coal. They state that the precise cost of generating electricity at large nuclear stations, in the 1 million kilowatt range is unknown, but that even if these plants work as expected, bituminous coal should be kept competitive. It is their view that the cost of nuclear fuel may rise in the future as a result of the shortage of uranium, but that utility executives have been inclined to follow the optimistic projections of the Atomic Energy Commission. They assert that, in some situations, nuclear power was chosen over coal, even though the latter had an edge from a cost standpoint, because of the fear that governmental restrictions on sulfur emissions would require expensive corrective measures. However, progress has been made to overcome this problem and the protestants expect that coal's handicap will be reduced substantially within a few years.

It is also asserted that the proposed increases will nullify, in effect, the volume rates which were established after detailed negotiations with various utility companies leading to operational innovations and substantial economies to the carriers. To secure reduced volume rates, the protestants accepted such tariff limitations as restricted turn-

around time, minimum number of cars per train, placement time limits for unloading, weighing of the coal by the utility, enlarged trackage at receiving stations, the purchase and use of special unloading equipment, and the payment of freight bills on an expedited basis from unloading reports. The protestants argue that the proposed increases violate the spirit and understanding of the negotiations that led to the establishment of these volume coal rates and that such increases will effectively undermine the integrity of all rates negotiated in good faith.

Southeastern protestants contend that, since the railroads serving this area are among the most prosperous carriers in the Nation, their request for additional revenue is totally unjustified. A cost study was presented by these protestants which indicated that the rates presently in effect provided the involved railroads in excess of $20 million per year in revenue contribution above out-of-pocket costs. While the average rate of return of all class I railroads in 1967 was 2.45 percent, the principal coal-carrying railroads serving the Southeast had rates of return of over 5 percent in 1966 and 1967. But such a rate of return cannot be said to be excessive when low-risk capital, such as government, municipal, and high-grade corporate bonds are currently returning [729] better than 6 percent. Moreover, as we have long recognized, in general revenue proceedings, the needs of the group rather than individual lines must control. See *General Commodity Rate Increases, 1937*, 223 I.C.C. 657, 744.

These protestants also assert that little or no increase was applied after the Ex Parte No. 256 proceeding on coal moving under section 22 rates to the Tennessee Valley Authority, with which they compete; that the railroads

would have received over $3 million in added revenue if the increases had been applied to those rates; and that it is highly inequitable to subject their coal traffic to substantial increases while excusing their competitor from making any additional contribution to the railroads. This is not a matter appropriate for consideration in this proceeding.

Coal moving to upper lake ports and to Canada meets competition from natural gas and substantial rate reductions have been made in recent years to counter loss of traffic. In 1958, a blanket reduction of 30 cents per ton was made, followed in the period 1960-65 with a number of specific reductions to particular destinations, ranging from 13 cents to 37½ cents. In 1964, rates on coal moving to points in Ontario were reduced by from 30 to 60 cents per net ton. In June 1968, a reduction of 40 cents per ton was made in the rail-lake transportation charges to meet the competition of lignite moving from Canada. In recent years the Penn Central, Bessemer and Lake Erie, and Norfolk and Western have spent in excess of $30 million in improving storage and transfer facilities at lower Great Lakes ports to handle the lake-cargo movement of coal.

Statistics furnished by the protestants indicate that coal moving via rail-lake transportation from United States origins to all destinations in the United States has increased from 38,210,000 tons in 1963 to 40,636,000 tons in 1966. The Lake Carriers Association and the Upper Lake Docks Coal Bureau, Inc., seek elimination of the increase or limitation thereof insofar as lake-cargo coal is involved, asserting that particular problems are encountered due to the movement by different transportation methods. Attention is called to instances of diversion from vessel to rail movement following the introduction of trainload rates. The

respondents, however, assert that the reduced rail rates were made necessary by the threatened loss of traffic as a result of competing fuels. The water carriers refer to the reduction in tonnage handled by them between 1965 and 1966 in movements to Michigan, Wisconsin, New York, Minnesota, and Indiana, and ar- [730] gue that if the full increase is applied it will be impossible for them to increase their rates to meet their cost increases. Substantially similar contentions were made in Ex Parte No. 223 and in Ex Parte No. 256. Within the scope of the issues in a general revenue proceeding, we find no basis shown for denying the proposed increase on coal moving to lower lake ports.

A substantial tonnage moves from United States ports on the lakes to Canada for fuel and metallurgical uses. The parties disagree as to the extent to which United States vessels participate in the latter movement, the protestant vessel owners asserting that such coal moves almost exclusively in Canadian vessels. Dealers in bituminous fuel coal in Canada stress the competition of natural gas and oil in their marketing territory, as do also the receivers in upper Michigan, Wisconsin, and Minnesota. The competitive conditions in these areas are comparable to those encountered by users of coal throughout the United States, and no reason appears why lake-cargo coal should be exempted from the increases.

Protestant steel manufacturers assert that their raw materials move under more favorable circumstances and conditions than almost any other group of commodities and that such favorable transportation characteristics should be accorded substantial weight in the Commission's consideration of the propriety of the proposed increases.

These raw materials, they contend, move to protestants' plants in multiple car or trainload quantities, are loaded to heavy average carload weights, are handled in regular movements from a limited number of origins to a limited number of destinations requiring relatively little switching and relatively few interchanges, and the cost of transportation, therefore, is relatively low. According to protestants, unit cost trends since 1960 have been generally declining and the trend in contribution to revenues over and above out-of-pocket costs has been rising, resulting in a disproportionate share of carrier revenue requirements being assessed against these commodities. A cost analysis was presented which indicates that the contribution to the railroads' constant cost and profits made by metallurgical coal during the period 1961-67 increased from $25.4 million to $32.6 million—a gain of over 28 percent.

Generally, steel manufacturers assert that the steel industry is contributing more than its share of the railroads' revenue requirements. Their calculations indicate that revenue from metallurgical coal movements exceeds out-of-pocket costs of the move- [731] ments by greater percentages in 1967 than in earlier years. The more significant comparison, however, is between the amount of service performed and the revenue received therefor. Thus, statistics which include steel industry raw materials as a group (bituminous coal, iron ore, coke, and fluxing stone) show that in the period 1950-66, tons transported by eastern railroads for the eastern steel industry constituted 21 percent of all tons carried and 18 percent of all ton-miles but produced only 12 to 13 percent of total freight revenues. Between 1950 and 1967, in the southern region, bituminous coal constituted between 23 and 26 percent of total tons carried, and produced between 13 and 15 percent of total revenue.

It is also urged that domestic steel manufacturers encounter severe competition from imported steel and cannot bear further increases in raw material costs. Problems in international competition cannot, however, be solved by regulatory limitation on otherwise valid rate increases of service industries.

The Federal Interagency Committee on Coal Exports, composed of representatives of the Treasury, State, Interior, and Commerce Departments of the United States, the Coal Exporters Association of the United States, Inc., representatives of the Japanese Steel Industry, and Japanese Importers and Exporters of coal, oppose the proposed increases on export coal. The committee is primarily concerned with the allegedly adverse effects the proposed increases will have on the Nation's international balance of payments situation, which at the present time is in a deficit position. It is also concerned with the impact the proposal will have on both local and national economies.

Coal exports have made a major contribution to the balance of payments running close to $500 million a year and continuation of these trade earnings is of great importance to the Nation. These protestants assert that the most influential factor in the maintenance of the present position of United States export coal in the international energy market is the delivered price of such coal at exit ports, and it is contended that any action which increases the delivered price of coal is competitively disadvantageous and inimical to the Nation's balance of payments.

The Japanese interests assert that a further increase in the price of American coking coal will compound the already serious balance of payments problem and will also

encourage the large Japanese trading companies to further develop alternate sources of supply. They stress the competition American coal is facing from [732] Australia, western Canada, the U.S.S.R., Poland, and other countries and state that should the price difference between American coking coal and coal from other sources become greater, they would have to seriously consider cancellation of present long-term contracts.

Attention is also called to the losses in shipments of United States coal to European countries recently, particularly to Italy, the Netherlands, Belgium, and Luxembourg. While these are alleged to have resulted from increases in delivered prices of U.S. coal in 1967, other factors are admittedly involved, including the increasing availability of high-grade coking coal from West Germany, Poland, and the U.S.S.R. Prices of these competing coals are not based strictly on economic considerations and the increased exports from West Germany were made possible by subsidies on surplus coking coals which enabled the delivery of these coals in other countries below the listed f.o.b. mine prices. In addition, there was an overall decrease in demand for metallurgical coal. Increased competition from British coal is now being experienced as a result of the devaluation of the British pound. In some instances import quotas limit the extent of United States participation in foreign coal markets.

The protestants estimate that the increase on bituminous coal moving by rail to the ports, based on 1967 shipments of 34.5 million tons would total $5.1 million. It is argued that if as little as 1.2 million tons of export coal traffic were lost, it would offset the additional revenues sought by the carriers and would also mean a loss of $13.2 million

to the U.S. balance of payments. In Ex Parte No. 256, the respondents did not apply the general increase on export coal, the justification, in part, being that it would serve the national interest because of the contribution of such traffic to the balance of payments, 329 I.C.C. 854, 934. In this proceeding the respondents expect no loss of export traffic and assert that, to the extent that the higher freight rates are borne by the foreign receiver, it will improve the balance of payments. In any event, our conclusions as to the lawfulness of the proposed increases cannot depend upon their collateral impact on the balance of payments. Additional operating revenues are needed by respondents and this traffic should bear its fair proportion of the burden.

Overseas exports of coal since 1959 have fluctuated yearly between 24 million and 34 million tons. Nearly 95 percent of this traffic moved through piers in the Hampton Roads area. At these [733] piers and at Baltimore, the railroads have made substantial improvements in the facilities and invested in numerous additional freight cars to handle the coal movement. The charge assessed by the railroads for dumping the coal into vessels at Hampton Roads, 4½ cents per net ton, has not changed since 1910. No change is to be made under the present proposal. The volume of coal exported has declined in recent years notwithstanding that the rates have not been increased since 1960. The increase at that time was only 1.6 percent over the 1957 rate. Since no increase in rates on export coal was made under Ex Parte No. 256, the respondents assert that the increase here in issue will result in a rate level only 5.5 percent over the 1957 level. They point out that the greatly increased capacity of

many new ocean vessels requires the accumulation of many more loaded cars, with consequent greater car detention and increased costs to the railroads.

While it appears true that any increase in the delivered price of coal will tend to reduce its competitive position in foreign markets, it cannot be found that the differences due to the rate increase here in issue are as significant as claimed, or that United States coal would not be underbid whether or not the increase is applied. There is evidence that the quality of United States coal is such as to make it desirable, if not necessary, and that long-term contracts covering some 15 years in the future have been made. Some contention is made with respect to differences in rates charged on export coal and those charged on coal moving to the piers for coastwise transportation. A general revenue proceeding, however, is not appropriate for determination of issues of relationships of this nature.

Generally the trainload rates increased as here proposed are at the level of single car rates of 16 to 20 years ago. To a number of electric utilities in the Northeast, the respondents show that the annual cost of the proposed increases would approximate less than 0.3 percent of the utilities' operating revenues.

The respondents do not share the views of most protestants that the proposed increases will result in diversion of rail coal to motor vehicle or barge, or to conversion of coal powered plants to oil or gas, or to increased use of mine-mouth generating plants and plants powered by nuclear energy. The respondents maintain that coal traffic, like all other traffic should bear a fair proportion of the needed increased revenues. To the extent that specific instances appear where rate reductions are needed to

counter real traffic losses, they say adjustments will be made. [734] There is evidence that the construction costs of nuclear-powered plants have risen appreciably and some doubts exist as to the future investments necessary to produce high-capacity plants of this type. Costs of other forms of transportation, and of competing fuels are also increasing. Technological improvements, and the ability of electric power producers to connect power lines so as to utilize the most economical sources of supply provides no basis for excluding coal from sharing in the increased costs of transportation.

The evidence is not convincing that freight rates on bituminous coal are a major factor in decisions to invest in nuclear-powered plants. We are not persuaded that the rate increases here proposed will materially influence decisions to be made as to the establishment of mine-mouth electric generating plants. While the alternate use of coal, gas, or oil, according as price and availability dictate, will probably be influenced to some extent by any change in the price of delivered fuel, prices of competing fuels are also subject to cost increases. Should competitive situations arise, appropriate adjustments can be made by producers and carriers. That conditions exist which permit such situations to develop furnishes no ground for exempting coal from bearing an appropriate proportion of the increased revenues shown necessary.

Iron ore.—The railroads propose to increase their line-haul rates on iron ore (including pellets) 5 percent, maximum 20 cents per ton. The charges for handling iron ore at upper and lower Great Lakes ports are proposed to be increased 6 percent except that no increase is proposed for handling iron ore (not ground or hydrated) or iron ore

sinter from hold to rail of vessel at lower lake ports. They also propose to increase by 6 percent the charges for ground or dock storage of ores at Lake Erie ports.

Iron ore is an important commodity to the respondents, both from a tonnage and a revenue standpoint. In 1967, class I railroads in the United States originated 92.8 million gross tons of iron ore, from which they received total revenue of $204.5 million, and average revenue per gross ton of $2.20. In 1967, class I railroads in the eastern district, including the Pocahontas region, terminated 46.5 million gross tons, from which they derived revenue of $109 million, an average per gross ton of $2.35. The tonnage of iron ore carried by all class I railroads in 1967 was 6.05 percent of the total freight carried and the revenue therefrom represented 2.24 percent of the total freight revenue. The tonnage [735] of iron ore transported by the eastern district railroads in 1967 was 6.28 percent of all freight tonnage and produced 3.16 percent of the revenue received from all freight.

The principal iron ore movement within eastern territory is ex-lake iron ore from lower Lake Erie ports to steel mills south thereof. Other important movements are the import movements from the eastern seaboard and movements from mines within eastern territory. It is estimated that the proposed increases will produce approximately $6 million for the eastern railroads on an annual basis and will reflect an average rate increase of approximately 4.8 percent.

The proposed increases within eastern territory are opposed by numerous steel companies which contend that the present rates on iron ore are excessive and that any further increase cannot be justified. No specific reference is made to the rates on imported iron ore nor to the level

of the all-rail rates wholly within eastern territory. Objection is made to the increase in the rates on ex-lake iron ore from Cleveland, Ohio, to Weirton, W. Va., on the grounds that the existing rates do not reflect the highly favorable transportation conditions and disproportionately high net revenues from this low-grade commodity. Most iron ore received at Weirton comes from two sources, the Michigan-Minnesota ranges and Labrador. It is claimed that the present volume rates as increased under Ex Parte No. 256 yield revenue per gross ton-mile of 19.8 mills on the Lake Superior ore and 20.3 mills on the Labrador ore. The proposed increases would increase these earnings to 20.8 and 21.2 mills per gross ton-mile, respectively.

The respondents compare the single-car rates approved by the Commission in Ex Parte No. 223 (Sub-No. 3) *Increased Rates On Iron Ore*, 313 I.C.C. 549, with the present volume rates. In Ex Parte No. 223 we noted that the ex-lake iron ore movement reflected volume transportation conditions. The ex-lake iron ore rate to Weirton at the Ex Parte No. 223 level is $2.39 per gross ton on both the Lake Superior and Labrador ores. The present volume rates on iron ore traffic which include the increases under Ex Parte No. 256, are $2.24 on traffic receiving a prior regulated movement by common carrier within the United States and $2.29 when such movement has not occurred. Under the proposed increases these volume rates will become $2.35 and $2.40, respectively. The former is 4 cents under and the latter is 1 cent over the level of the rates found not to exceed the maximum of reasonableness 7 years ago.

[737] Opposition to the increases in iron ore rates in western territory is directed primarily to the movement

from the Lake Superior region and, more particularly, to the movement to the upper lake ports. The latter movement, in 1967, exceeded 42 million tons, of which two-thirds moved from Minnesota origins and one-third moved from Michigan origins. In addition, there is an all-rail movement in western territory from the Lake Superior region ranges and a substantial all-rail movement from other origins in that territory.

The seven common carrier railroads which transport iron ore from the Lake Superior district to the upper lake ports are: Chicago and North Western Railway Company (CNW); Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee); Duluth, Missabe and Iron Range Railway Company (DM&IR); Great Northern Railway Company (GN); Lake Superior & Ishpeming Railway Company (LS&I); Northern Pacific Railway Company (NP); and Soo Line Railroad Company (Soo Line). These carriers propose to apply the full 5-percent increase, maximum 20 cents per gross ton, on all-rail iron ore, including pellets, moving from that region. The four Minnesota ore-carrying railroads (DM&IR, GN, NP, and Soo Line) seek the full increase on iron ore and iron ore pellets moving from Minnesota ranges to upper lake docks, as well as to all-rail destinations. They also seek the 6-percent increase in dock handling charges at upper lake ports. However, the Michigan ore-carrying railroads, (CNW, Milwaukee, LS&I and Soo Line)[2] do not propose to take the proposed increases on iron ore moving from Michigan ranges to upper lake docks in Michigan.

In 1967, iron ore comprised 25.6 percent of the total tons carried and 5.6 percent of the total gross freight revenues

2. The Soo Line serves both the Minnesota and Michigan ranges.

of the seven upper lake carriers. The gross freight revenue derived from the movement of iron ore by all western district carriers in 1967 was slightly over $87 million, of which $55.5 million or 64 percent accrued to the upper lake carriers.

The respondents refer to the decline in rates of return of the seven upper lake carriers as evidence of the need for additional revenues. The average rate of return for these seven carriers was 3.37 percent in 1966 and dropped to 1.31 percent in 1967. This is compared with declines of from 4.03 percent to 2.75 percent for western district railroads and from 3.90 percent to 2.46 percent for all class I railroads in the United States. The respondents contend that the present earnings trends of both the upper lake ore carriers and the western district carriers, as a whole, dis- [736] close a need for additional revenues which can be met only if iron ore, which comprises a substantial portion of their tonnage, contributes to their revenue requirements. They take the position that the Commission should consider the revenue needs of all the carriers in making its evaluation of the sought increases, but that, in any event, whether the revenue needs are considered from the standpoint of the Minnesota carriers, the upper lake region carriers as a group, or the western district carriers as a whole, the proposed increases on iron ore are vitally and urgently needed.

In 1967, the four Minnesota ore-carrying railroads transported over 28 million tons of iron ore from the Minnesota ranges to the upper lake docks. DM&IR handled 58.1 percent of the shipments, GN 39.3 percent, NP 1.5 percent, and Soo Line 1.1 percent. DM&IR derives over 90 percent of its tonnage and 80 percent of its freight

revenues from iron ore. Respondents assert that while DM&IR was considered a relatively prosperous carrier in the early 1950's, its rate of return has been generally low since 1955, averaging 3.73 percent in the period 1956-60, 3.39 percent from 1961 to 1965, an increase to 6.71 percent in 1966 and a decline to 4.30 percent in 1967.

Third-quarter earnings of the DM&IR for 1968 are below those for 1967, and 9-month earnings in 1968 approximate those for 1967. Its forecast for the calendar year 1968, with the authorized 3 percent interim increase, indicated a rate of return of 4.20 percent. For the constructive year, based upon the estimated 1968 level of traffic and with the full increases sought, the rate of return would be 4.59 percent. Dock tonnage through August 1968 exceeded that for the same period in 1967 by approximately 123,000 tons. However, the respondents insist that the total remains substantially below the original forecast of a 1,151,000 ton increase in dock tonnage in 1968 over 1967, upon which the rate of return of 4.29 percent for the calendar year 1968 was predicated.

Great Northern's rate of return of 2.08 percent in 1967 was the lowest in the last 17 years. With the interim increases authorized, its rate of return for the calendar year 1968 is estimated at 2.96 percent and with the full increases sought, its rate of return for the constructive year would be 3.39 percent. Its net railway operating income for the first 9 months of 1968 barely equaled that for the same period in 1967. Through August 1968, GN handled 8.2 million gross tons of iron ore over its Superior dock compared to 7.3 million gross tons during the same period in 1967. It predicted, however, a decline in pellet movement in the latter [738] part of 1968 because of the shutdown of a pellet plant and that its total 1968 ore tonnage would approximate that for 1967.

In support of the reasonableness of the proposed increased rates, the respondents point out that the 1939 level of iron ore rates from the Missabe Range to upper lake ports found reasonable in *Butler Bros. v. Great Northern Ry. Co.*, 276 I.C.C. 679, has borne an aggregate increase of only 68.1 percent while the same iron ore moving beyond lower lake ports has borne an aggregate increase of 128.1 percent and other commodities moving in the West have borne increases ranging from 106 to 131 percent. They also point to reductions recently made from the normal level of upper lake iron ore rates in cases where the railway company is not required to perform certain switching services at origins or at upper lake docks, and on new movements at annual volume minima. Great Northern has invested $6 million and DM&IR $5 million in new pellet loading and unloading facilities to accommodate this movement. Additionally, respondents show that the rail charges of the Canadian National Railway Company on iron ore from the Steep Rock Mining District in Ontario to its upper lake dock at Port Arthur, Ontario, for transshipment by lake vessels, are substantially higher than those to United States upper lake ports for comparable hauls. Also from eastern Canadian producing origins, the rates, including agreed charges, are likewise substantially higher than upper lake rates on iron ore, including pellets.

The protestants maintain that of the total tonnage of iron ore moving to Great Lakes destinations, the percentage moving from Minnesota docks has been steadily declining. From a high of 43.2 million tons and 58.9 percent of the total shipments of iron ore into the Great Lakes in 1960, Minnesota railroad dock shipments in 1967 declined to 28.3 million tons and 35 percent of the total Great Lakes shipments. While Minnesota dock shipments continue to decline,

Canadian and other foreign ores are increasing their share of the market. In 1960, 3.7 million tons of Canadian iron ore was shipped over Canadian docks in the Lake Superior district, compared to 4.9 million tons in 1967. Eastern Canada and other foreign sources shipped 3.6 million tons into the Great Lakes area in 1960 and in 1967 such tonnage had increased to 14.6 million tons, representing 18.1 percent of the total market. In rebuttal, respondents show that in 1966 protestants shipped 33 million tons of iron ore from foreign sources as opposed to only 14 million tons from Michigan and 18 million tons from Minnesota.

[739] The protestants also claim that producing areas in West Africa, Australia, and South Africa are major sources of foreign competition. However, the record indicates that neither French nor British West Africa have exported iron ore to the United States since 1960; no iron ore has been imported from South Africa in the last 3 years; Australian ore exported to the United States in 1967 amounted to only 1,023 tons; and the 3 million tons of Liberian ore shipped to the United States in 1967 was 10 percent less than the 1966 tonnage.

Respondents assert that the proposed increases were arrived at after foreign competition was taken into consideration. The combined effect of the increases in iron ore rates approved in Ex Parte No. 256 and those proposed herein, they urge, equalizes the treatment of Lake Superior iron ore and foreign import ore and continues the railroads' policy of keeping the increases on Lake Superior region iron ore competitive with increases on import iron ore. For example, they show that to Pittsburgh, Pa., import iron ore would be increased to a total of 30 cents and Minnesota iron ore would also be increased to 30 cents for direct shipping ore and 29 cents for iron ore pellets. Respondents'

comparisons are of line-haul rates only, due to their inability to obtain the contract dock handling charges made on import ore at Atlantic ports.

Protestants regard as negligible the small tonnages handled by the NP and Soo Line in 1967 and argue that for all practical purposes the DM&IR and GN, which together handled 97.4 percent of the traffic in 1967, are the only railroads transporting iron ore from the Lake Superior region to upper lake ports that would participate in any increased revenues derived from these movements. They contend that the financial condition of the DM&IR and GN clearly establishes that increases in the line-haul rates and dock handling charges on iron ore from the Minnesota mines to the upper lake ports are not justified. They also point out that the DM&IR is a wholly owned subsidiary of the United States Steel Corporation, the principal shipper over that railroad and a principal competitor of protestants. While, as previously indicated, the financial position of the DM&IR appears to be somewhat better than that of the GN, the current rates of return for these carriers cannot be described as excessive. Furthermore, we must also consider the revenue needs of the NP and Soo Line, which also participate in this traffic. We have repeatedly held that it would be unfair to deny needed increases in revenues on iron ore on the ground that some of the carriers participating in the traffic might [740] not need them. *Increased Freight Rates, 1958*, 302 I.C.C. 665, 689; 304 I.C.C. 289, 332; *Increased Freight Rates; 1967*, 329 I.C.C. 854, 929. The record in this proceeding shows that all of the Minnesota ore carriers are in need of the proposed increases on this traffic.

Nor does the fact that the Michigan ore carriers have flagged out of the proposed increases constitute grounds.

for denying the proposed increases to the Minnesota ore carriers. The record indicates that the Michigan carriers joined in the publication of the proposed increases but subsequently decided to forego them because of carrier competition. It may be that an increase in the rates from the Minnesota mines and not from the Michigan mines will have competitive ramifications and alter previously existing relationships; but that fact, however, is sufficient to deny the Minnesota iron ore carriers the proposed increase.

The record also indicates that much of the Canadian iron ore competition is provided by protestants themselves and that 13.8 million tons, shipped from the Michigan mines in 1967, was also shipped by protestants. As to the contention that the proposed increases will enhance competition from two private rail carriers serving pellet plants in Minnesota, it is reasonable to conclude that such carriers have had and will have cost increases the same as the respondents.

The upper lake dockage and handling charges are proposed to be increased 6 percent. The 19.5 cents per gross ton charge at Duluth and Superior, considered typical, would be increased by 1.5 cents. No increase was sought in these charges in Ex Parte No. 223; and in Ex Parte No. 256 an increase of only ½ cent or 2.5 percent was sought. In view of the increased operating costs experienced by the railroads in the intervening years, the proposed increase of 6 percent does not appear to be excessive.

Arguments concerning the alleged difficulties in the clerical or administrative handling of refunds of ore charges established in Ex Parte No. 256 were considered and disposed of in that proceeding. Nothing is presented in this record to warrant a different conclusion.

I.C.C. Final Order

Two upper lake iron ore producer-shippers oppose the proposed increases in the all-rail rates on iron ore from mines in Minnesota and Michigan to destinations in the Chicago, Ill., district and to Granite City, Ill., as well as those on iron ore pellets from Pilot Knob, Mo., to Granite City. In 1967, approximately 1.2 million tons of iron ore moved all-rail from Minnesota-Michigan mines to Indiana and Illinois and some 100,000 tons have moved from [741] Pilot Knob to Granite City since May 1968, when production of pellets at Pilot Knob began. The protestants contend that this traffic, unlike other all-rail iron ore traffic in the western district, is faced with intense competition from foreign ores and the competition of a Minnesota private rail carrier producer.

The all-rail rates from the Michigan-Minnesota origins generally reflect economies incident to volume movements and are well below maximum levels; and the multiple-car rates from Pilot Knob to Granite City represent a substantial reduction under the single-car rates. The private rail carrier producer has costs that are subject to inflationary trends like those of the railroad respondents. The substantial increase in the all-rail movement from Minnesota-Michigan origins, from 435,000 tons in 1961, to over 1 million tons in 1967, indicates that the proposed increase will not appreciably slow the potential growth in the all-rail movement of iron ore.

An iron ore producer at Wabuska, Nev., opposes the proposed increase on the ground that any increase in the rail cost of moving its iron ore from its Nevada mine to Pittsburg, Calif., for export will increase substantially its overall cost and impair its ability to survive in the Japanese market because of Australian ores selling at a lower landed cost in Japan. All export ore, as well as

domestic ore, is subject to the proposed increases. Export ore to Japan has increased in the last 10 years to a peak of 3.6 million tons, of which protestant's movement is about 10 percent. No persuasive reason has been shown for exempting export iron ore traffic from the proposed increase.

Based upon all the evidence of record, we conclude that the increases proposed in the rates on iron ore will not result in rates and charges which exceed maximum reasonable levels or will significantly divert the traffic to other means of transportation; and that the iron ore traffic can and should bear the proposed increases.

Pig iron, iron and steel scrap.—By our order entered November 25, 1968, we lifted the suspension of most of the tariff schedules under investigation and permitted the increased rates and charges to become effective; but, in view of the situation to be discussed next, we retained under suspension pending further consideration, master tariff item 845, pig iron, and iron and steel scrap. Rates on these commodities are proposed to be increased 25 cents per ton, net or gross, as rated, on rates not exceeding $8 per ton, and 5 percent on rates exceeding $8 per ton. This compares with the [742] increase of 5 percent, maximum 20 cents per ton, proposed on iron ores. In Ex Parte No. 256, we held that the competitive relationship between iron ore and iron and steel scrap for use in steel mills required that the increase on scrap not exceed that applied to ore. In the present case the respondents have argued that our findings in the prior case were erroneous and that no justification exists for requiring increases on scrap to be related to those on ore.

In Ex Parte No. 256, producers of pig iron did not present evidence respecting their position in this controversy.

They have done so in the present case, however, and have shown, without apparent contradiction by respondents or other protestants, that pig iron does compete directly with scrap as input for steel furnaces. The respondents have, in this case and in prior increase cases, published similar increases on the two commodities. We agree that, in bearing some share of the needed additional revenues, these two commodities should be treated alike. Pig iron producers argue that, since pig iron was permitted to be increased in Ex Parte No. 256 to a greater extent than scrap, any increase allowed in this case should not result in a total increase on pig iron greater than the total increase on scrap produced by the Ex Parte No. 256 increase plus that permitted herein. These protestants did not, however, seek reconsideration of our order in Ex Parte No. 256 and it is manifestly impractical to review and attempt to revise past rate adjustments in this proceeding.

As in prior proceedings, the protestants call attention to the public interest in removal and utilization of scrap and the importance of maintaining a viable industry dedicated to this task. The commodity involved is that referred to as obsolete scrap, comprised of old automobiles, appliances, railroad equipment, demolition material, et cetera, which constitutes about 23 percent of total ferrous scrap consumption. The remainder is comprised of home scrap and prompt industrial scrap, produced within the steel mill and steel fabrication industries, which flows directly back into the steelmaking process. Obsolete scrap is purchased to supplement this supply as needed. The protestants assert that the obsolete scrap industry is depressed, with prices per ton at a very low level. The respondents contend, however, that between 1961 and 1966 there was a substantial increase in the amount of scrap moved by rail, that the

price of scrap fluctuated considerably, and that no increase in rail rates were applied but, rather, a number of reductions were made. They argue that prices of obsolete scrap are [743] governed by the extent of activity in the steel industry and do not depend upon freight rates.

Pig iron producers, while objecting to any increase in rates, call attention to the intensive competition of scrap iron and the need for similarity of rate treatment. These protestants serve generally nonintegrated steel mills and foundries, which do not produce their own hot metal supply. Prices of pig iron are substantially higher per ton than scrap, which adds to their marketing problems. The industry is said to be suffering from a cost-price squeeze and a number of pig iron plants have discontinued operations, without replacement, in the last 5 years. The economic circumstances which these protestants encounter is not substantially different from those affecting the respondents and many other protestants. We find that both scrap iron and pig iron should bear some share of the additional revenue needs of the railroads.

In the steelmaking process both scrap iron and pig iron compete as major components of the charge in the furnace. Integrated steel producers supply their pig iron needs by manufacture within their own complex. The primary component of the charge in the blast furnace, which produces pig iron, is iron ore. A substitute for both pig iron and scrap is high grade iron ore which has been subjected to other processes which increase its iron content to well over 90 percent. Thus, while the rates on these various commodities are not necessarily related, we are of the opinion that, under current conditions, and where the issues involve the increase in contribution necessary to meet a revenue

need, the burden should be imposed in substantially similar fashion. We find that the increases on pig iron and iron and steel scrap, item No. 845 of the master tariff, should not exceed those applied to iron ores, item 1060.

Semifinished iron and steel.—Rates on semifinished iron and steel are proposed to be increased 5 percent, minimum 2 cents per 100 pounds or 40 cents per ton, net or gross. Included are items such as billets, blooms, ingots, sheet bars, slabs, slab breakdowns, skelp, and coiled rods. A number of processors and fabricators oppose the increase, asserting the possibility of diversion or traffic, and contending that the rates produce revenue well in excess of out-of-pocket costs. They also assert that any increase makes more difficult the problem of competing with imported commodities. Many reduced incentive rates have been provided for the movement of these commodities and the respondents contend that the substantial interplant movement of semifinished [744] steel is not dependent upon the transportation rates to the extent claimed by protestants. While the 2 cents per hundredweight minimum produces increases in excess of 5 percent on very short hauls, it reflects the recognized higher terminal costs which have greater impact on such movements. Generally rates for these commodities are at a low level, ranging from 7.2 percent to 12 percent of first class. The revenue per ton on semifinished steel in 1965 was lower than in 1950. The proposed increase is generally less than 1 percent of the sales price of finished steel and will not, in our opinion, have any significant impact on competition with imported products. We find the proposed increase on semifinished iron and steel just and reasonable.

Aluminum ores and products.—On aluminum ores, including bauxite and alumina, the increase proposed is 15 cents

per ton, net or gross, as rated, up to and including $6.50 per ton and 25 cents per ton, net or gross, on rates above $6.50 per ton. On aluminum ingots, billets, pigs, other primary metal products, and mill products the increase proposed is 5 percent, minimum 2 cents per 100 pounds or 40 cents per ton, net or gross, as rated, and the increase proposed on aluminum foil is 5 percent, minimum 2 cents per 100 pounds.

It is the position of the aluminum industry that respondents have neither justified their need for a general revenue increase, nor have they proved that the proposed increases are reasonable and free from unjust discrimination, and undue preference or prejudice. The aluminum industry is one of wide plant dispersion which generates a heavy demand for long-haul transportation at all stages of the production process. Aluminum is a growth industry and, to support its continued growth, it must compete in many markets with other metals and especially with iron and steel. Aluminum is increasingly used as an alternate for steel in many markets, including the container market, where aluminum cans are being used for beer, frozen citrus concentrates, and motor oils. Iron and steel and aluminum are significant competitors. The protestants assert that the proposed general increase in the form of a percentage increase disrupts competitive relationships and will widen the rate differential between aluminum and steel.

The increases are opposed not only on the grounds of their inflationary effect, but also because those proposed for the aluminum industry are greater than for the iron and steel industry. In this regard it should be noted that the increases sought on aluminum products are the same as those sought on iron and steel products. As to the claim that respondents are discriminating in their [745] treat-

ment of aluminum ore as compared with iron ore, transportation characteristics are substantially different. Iron ore moves in open-top cars in short hauls, whereas bauxite and alumina must be protected from moisture and are transported in covered hopper cars. No correlation has ever existed in the rate levels between alumina and iron ore. The fact that the sites chosen by the aluminum industry requires extensively long transportation hauls involve circumstances which are beyond the control of respondents. It is apparent that the rate structure has not hindered development. The aluminum industry has expanded sixfold since 1945.

The respondents are fully aware of the competitive problems confronting them. They have indicated that should the proposed increases place any particular movements in jeopardy, action to retain the rail movement will be taken. We find the proposed increases to be just and reasonable.

Copper products, lead and zinc ores and concentrates.—The copper producers oppose not only the proposed increases of 5 percent, minimum 2 cents per 100 pounds, or 40 cents per ton, net or gross, as rated, on primary copper smelter products, but all proposed increases on the grounds that respondents have neither shown an overall revenue need, nor have they justified with necessary cost-revenue comparisons, or otherwise, the varying increases proposed on different commodities. The movement of primary copper smelter products is substantially long-haul traffic at very high loadings and revenues and profits per car. On much of the traffic, a double haul is involved. Copper produced 185 percent more revenue per car in 1965 than the average of all carload traffic.

Cost-revenue comparisons submitted by the producers indicate that contributions averaged 40 percent above the con-

tributions made by the average of all traffic. Based on projections of substantial growth, copper will be making even greater contributions in the future without any rate increase. It is contended that respondents have failed to consider the impact of the recent copper strike and its effect on copper producers who are now being asked to provide increased revenues for the railroads based upon the railroad claim of less favorable earnings during an abnormal period.

Current copper prices are no higher than those in effect in 1964. It is claimed that no evidence was submitted to rebut the showing of extremely high profitability per car or per ton being enjoyed by respondents on the present level of copper rates. It is further claimed that respondents have submitted no data showing that the [746] cost of service on primary copper smelter products had been increasing, and that the proposed increases thereon are totally unrelated either to the cost of service or to the relative changes in cost of services resulting from alleged wage or price increases.

This group of protestants alleges that the proposed increases are inherently discriminatory, because different percentage increases are being placed on different commodities, all of which are receiving rail transportation from the same carriers.

The lead and zinc industries contend that the respondents have failed to justify their proposed increases on the basis of cost increases or revenue needs; that the increases proposed on lead and zinc are unjust and unreasonable because of import competition and a depressed price situation as well as the more favorable treatment accorded competitive metals; and that cost-revenue comparisons on lead and zinc show that these commodities are presently contributing

more than a fair return to the respondents. The same increases as proposed on aluminum products are proposed on primary zinc and lead smelter products. However, unlike the stated increases proposed on aluminum ores, the proposed increases on zinc and lead ores and concentrates are 5 percent, except to, from, or within southern territory, where the increase proposed is 4 percent without a maximum, despite the fact that the Commission in previous increase proceedings held that holddowns were necessary for competitive reasons. See *Increased Freight Rates, 1951*, 284 I.C.C. 589, 656.

It is claimed that the lead and zinc industries are confronted with severe competition from imported metals. The prices of lead and zinc are set by the market. Thus, these industries cannot pass along either their own wage increases, or those proposed by respondents. The current price of lead is 1.5 cents per pound less than it was in 1967, and zinc is 0.34 of a cent less per pound. In view of the showing that the present rates on lead and zinc are yielding an above-average return, the protestants assert that the increases proposed on lead and zinc have not been justified.

We have previously made findings as to the overall general revenue needs of the respondents. The copper producers, while alleging discrimination, have not shown with any degree of specificity that the selective increases proposed will create either undue preference or undue prejudice. More than bare allegations of discrimination are needed to warrant condemning the increases found to be critically needed to offset, in part, the increased operating costs of respondents. Neither can the relatively low [747] costs and high revenue contributions shown by protestants, taken at face value, be used as a basis for condemning the proposed increases on nonferrous commodities. Such com-

parisons, standing alone, are an insufficient basis for finding that the proposed increases will result in rates that exceed a maximum reasonable level. As to the import competition referred to by the lead and zinc industries, respondents have indicated that, where warranted, adjustments will be made to protect their rail movements.

Ferro alloys and spelter.—The increase proposed on these commodities is 5 percent, minimum 40 cents per ton, net or gross, as rated. One of the protestants contends that the proposed increase applied on raw materials used in the manufacture of steel creates undue prejudice by placing a greater burden on such raw materials than on commodities generally, and by making higher rate levels for shorter hauls. It does not oppose a fair and equitable increase, but believes a fair increase should not exceed 3 percent. Another protestant objects to the 40-cent minimum because of its effect on short-haul movements and suggests that removal of the minimum would produce an equitable increase. Both protestants show that the proposed minimum on their short-haul movements results in a somewhat higher percentage than would be applied on long-haul movements. Aside from the mere allegation of discrimination, no evidence was submitted to show a violation of the act. Increased expenses fall most heavily on terminal services which make up a larger proportion of the cost of handling short-haul traffic. In the circumstances the proposed increase is found just and reasonable.

Nonferrous scrap.—The proposed increase on nonferrous scrap is 5 percent, minimum 1 cent per 100 pounds, or 25 cents per ton, net or gross, as rated. Protestants allege that the proposed increases are unjust and unreasonable, discriminatory and will be self-defeating in that the

increases will reduce the scope of marketing areas, destroy the marginal, small dealer and divert rail movements to motor carriage. Nonferrous scrap materials shipped in quantity are mainly in competition with virgin metals. Nonferrous scrap has many favorable transportation statistics, including regular movement, favorable packaging, use of the same cars inbound and outbound thereby eliminating switching, heavy loading, and absence of need for special services. The present level of rates on scrap, without the proposed increases, they say, is amply compensatory.

[748] There is a wide range in the prices of the various types of nonferrous scrap. A comparison of various catagories thereof, February 1963 with March 1968, indicates an average increase of 59.8 percent. Thereafter, prices have dropped but still remain at levels above those in March 1963. Seventy-five percent of the movement of nonferrous scrap was in official territory in 1966, for average hauls of 441 miles, and 1,180 miles, respectively, within, and from and to that territory. These relatively long average movements indicate that there is a widespread demand for scrap. Beginning in 1963 in official territory incentive rates were established on scrap with minimum weights ranging from 40,000 to 100,000 ponnds. Within the South rates are subject to minimum weights of 40,000, 60,000, and 80,000 pounds. Presently nonferrous scrap is being handled at rate levels lower than those in effect in 1963.

Although protestants allege that the proposed increases will create discrimination, no probative evidence has been submitted to show undue preference or prejudice, or that the proposed increases, except as hereinafter provided,

applied to the present level of rates, would result in rates exceeding a maximum reasonable basis. The proposed minimums of 1 cent per 100 pounds, or 25 cents per ton, net or gross, as rated, as set forth in item 840 of the master tariff, are patenty inconsistent. The minimum which will be allowed will be 1 cent per 100 pounds, 20 cents per net ton, or 22 cents per gross ton.

Radioactive materials.—The 10-percent increase proposed on these commodities, which include irradiated fuel elements, uranium florides, oxides, and salts, and radioactive waste materials is opposed by the U. S. Atomic Energy Commission and the Westinghouse Electric Corporation. It is claimed that the stringent packing and safety requirements imposed on these commodities have resulted in a superior claim record and that in the event of a nuclear incident during transport the respondents under the Price-Anderson Act are provided substantial indemnity by the Government. It is further alleged that radioactive materials are in competition with coal and fuel oil, both of which are accorded lesser increases. Because of the extraordinary nature of this type of traffic, the handling of which requires unusual precautions to be taken, including the special cleaning of cars to prevent the possibility of contaminating other traffic, and in view of need shown for additional revenues, an increase greater than that accorded other traffic is warranted.

[749] *Farm products.*—The United States Department of Agriculture, regulatory agencies of many States, and various organizations representing agricultural interestes oppose increases on farm products, and on farm supplies such as fertilizers and animal and poultry feeds. Our attention is called to depressed conditions in agriculture, the con-

stantly rising costs of supplies used by farmers, and the inability of the farmer to increase the prices received for his products. We recognize the problems faced by the agricultural community and the relatively low level of net farm earnings; but we must also recognize that a sound and adequate transportation industry is equally essential to the economy of the Nation, and, indeed, to the welfare of the farmer as well. Net realized income of farm operators increased from $10.7 billion in 1957 to $14.5 billion in 1967, while railroad net income in the same period declined from $737 million to $555 million. Between 1959 and 1967 the index of prices received by farmers increased only 4 percent but, on the other hand, the railroad freight rate index for farm products declined between 1959 and 1966 by 9 percent. If all increases are taken on farm products as proposed, the average level of rail rates will be lower than in 1959. We cannot accept, as a general proposition, that the agricultural industry should not contribute some portion of the needed additional revenues.

Grain, grain products, feed, and feed ingredients.—By our order entered November 25, 1968, we lifted the suspension of most of the tariff schedules under investigation and permitted the increased rates and charges to become effective. In view of the complexity of the grain rate structure and the diverse application of the proposed increases by the respondents, we retained under suspension pending further consideration, master tariff item 515, grain and certain grain products. Rate increases proposed on these commodities are generally 6 percent, except that within the West and the western part of Illinois Freight Association territory they are 7 percent, and to and within the South, excluding flour and meal, they are based on a scale

reflecting about 5 percent.[3] The increases proposed on buckwheat, oat, rye, and wheat meal and [750] flour to points in the South are 6 percent, and within the South they are 3 percent. Several special adjustments are proposed, generally by particular railroads within the West, which are to be effected by waiving the increases or exchanging them for prior increases. Because of these special adjustments, the increases in the West are said to approximate 3 percent over the X-256 level.

The special adjustments in the West are accomplished by publication in connecting link supplements to the grain and grain products tariffs. They provide, in effect, either that the 7-percent increase will not apply, that it will not apply on certain commodities, or that it will apply in place of prior general increases. The Chicago and North Western Railway Company (CNW) did not increase its rates under either Ex Parte No. 256 or Ex Parte No. 259 and, to remain competitive, other railroads serving the same part of western territory[4] also waived the increases.

To the extent that other railroads did not take the increases at particular points they necessarily sacrificed their increases at intermediate points. Fourth-section departures called to the attention of the carriers in this proceed-

3. The rates per 100 pounds are increased:
0.5 cents on rates not exceeding 20 cents.
1.0 cent on rates over 20 cents but not exceeding 30 cents.
1.5 cents on rates over 30 cents but not exceeding 40 cents.
2.0 cents on rates over 40 cents but not exceeding 60 cents.
3.0 cents on rates over 60 cents.

Similar increases are provided for rates expressed in amounts per ton.

4. Generally north and east of the Missouri River and on and south of the line of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company from Minneapolis, Minn., through Aberdeen, S. Dak., to the Missouri River.

ing by the Chicago Board of Trade are being cleared. In some instances competing railroads have elected to lose traffic to those not taking the increase in preference to surrendering the increased revenue at intermediate points. Elsewhere, to maximize revenue, the competition has been met at certain points and not at others. The CNW, for example, would not apply the increases on grain from Oakes, N. Dak., whereas the Soo Line Railroad Company (Soo) would apply them from that point. Protestants, including the Nebraska State Railway Commission, Montana Commissioner of Agriculture, and the Public Utilities Commission of the State of South Dakota, contend that it is discriminatory for some railroads in a territory to take the increases while others in the same territory do not. A finding of discrimination, however, may not be based on a mere difference in rates. Rate differences between various origin areas cannot be appropriately considered or adjusted in a general increase proceeding. *Increased Freight Rates, 1967*, 332 I.C.C. 280, 300.

In most instances, the western lines propose to increase the local or gathering rates, at the Ex Parte No. 223 level, by 7 percent from, to, and between stations west and south of the area [751] served by the CNW. Excepted therefrom are rates published by the southwestern lines between points in the eastern part of western territory on grain and wheat flour, which are not increased. The intermarket proportional rates in western territory would be increased 7 percent over the rates at the Ex Parte No. 223 level, except that no increase would be applied in the northeastern part of western territory, and the increase would be applied to rates not subjected to the Ex Parte No. 223 increase in the southeastern part of western territory. The western carriers do not propose to increase export rates

to Gulf and Great Lakes ports, except for the gathering rates in connection with the lake export shipments and the multiple-car rates in connection with Gulf export shipments. These export rates are to be increased to the same extent as export rates to west coast ports, namely, 7 percent over the Ex Parte No. 223 level.

Under the present grain marketing practice, the price received by the farmer is the market price less the local or gathering rate to the market. This, in effect, requires the farmer to bear the transportation cost. The buyer at the first market, who pays the freight charges, uses the inbound billing to set off a part of the total charges if they are based on through rates on grain or grain products. In instances in which the gathering rates are increased, but the through rates are not increased to the same extent, such as the export rates to lake ports, the farmer pays a greater proportion of the through charge but no additional revenue is received by the railroads. Justification for the proposed increases in rates is the need for additional revenue. Application of the increases in a fashion which merely shifts the burden of the freight charges without producing additional revenue is not justified by the record herein. The order entered herein will limit our approval of proposed increases to the extent necessary to prevent application of any increase which has such result.

The protestants contend that the proposed increases will cause diversion of grain traffic to motor and water carriers. The Board of Trade of the city of Chicago calls attention to the 17-percent drop in volume of rail grain in 1967, compared with an increase of 10 percent in motor vehicle movement. This figure includes the corn movement, in which the rails suffered a 9-percent drop against a gain of

13 percent for motor vehicles. North Dakota interests point out that the production of barley has increased but that the railroads have not maintained their participation in the traffic. The United States Brewers Association, [752] Inc., asserts that the increases will accelerate the diversion of the brewers' traffic to private motor carriers, as well as dispersion of production facilities. Evidence of record demonstrates that, in specific situations, traffic diversion of this nature has occurred. While recognizing these possibilities, the respondents assert that appreciable diversion is not anticipated, and that they have and will continue to adjust their rates to meet specific competitive situations. Many variable and interrelated factors affect the movement of this traffic and the choice of the mode of transportation. Higher freight rates may divert some traffic, but will produce additional revenue on the remaining traffic. We cannot find that revenue losses due to possible diversion will exceed or even approach the additional revenues sought and believe that the increases should be permitted unless otherwise not shown to be lawful.

The State of North Dakota, the largest producer of barley in the United States, along with other interested parties, opposes the increase applicable to this commodity. Rates on barley produce higher revenues than those on most grains, and reduced rates have not been established from North Dakota origins as they have been on other grains and from other origins. Feed grade barley competes with other feed grains. The respondents point out that barley uses the full range of railroad services. Basic rate relationships between specific commodities may not be adjusted in this proceeding and the fact that rates yield substantial revenue does not establish that they are unlawful. No reason appears why barley should not assume the same increase as other grains.

Most of the States in the Northeast, including the New England States, New York, New Jersey, Pennsylvania Maryland, Delaware, and Virginia oppose the increases on feed and feed ingredients. There is extensive production of poultry, dairy, and livestock products in this area; but a major portion of the feed must be obtained from other sections of the country. The area also contains major areas of high-density population wherein are located markets for the products of this industry. Rates available to similar producers in the Southeastern States are generally lower and there is active competition between these two areas in markets now reached by both.

The present annual cost of grains and feed ingredients brought into the Northeast is over $807 million. The Eastern Federation of Feed Merchants, Inc., asserts that the proposed increases on these commodities would cost the farmers in this area an [753] additional $2.4 million per year. Production of feed within the area has decreased in recent years. In 1966 it produced over 7.15 million tons, or 14.3 percent of the commercial feed produced in the United States. In 1967 a 6-percent decrease was experienced. Between 1958 and 1968 the number of feed manufacturers and custom mixers in the Northeastern States declined from 432 to 242.

Production of poultry and dairy farm items has been undertaken by larger organizations in recent years, including retail chains and nonfarm cooperatives. A number of egg-producing complexes have been built or are under construction which are able to take advantage of economies of volume and have resulted in the discontinuance of many family-size operations. In 1951, farmers in New York sold $52 million worth of poultry, but only $16 million in 1967.

New Jersey formerly had a surplus of eggs, but now must obtain some of its requirements from other sources. In the 10 years prior to 1968, the number of farmers in Pennsylvania decreased from 116,000 to 77,000. Connecticut has had a 60-percent reduction in broiler production, although its egg production has increased some 25 percent. Maine and New Hampshire have relatively higher freight rates than in the Southeast and express fear that the proposed increases will threaten their poultry interests. Between 1964 and 1967, dairy permits issued in Virginia dropped 213, or nearly 50 percent. The dairy farmer in the Northeast also encounters the competition of dairy substitutes, such as filled or imitation milk. On their behalf it is contended that transportation costs on feeds to the Northeast must not exceed those to the Southeast.

Beginning in 1960, the eastern railroads embarked upon a study of their grain rate structure and, in July 1964, established a reduced scale (772 scale) of rates on corn. In 1967 this scale was extended to grains, feed, and feed ingredients. As pointed out in *Increased Freight Rates, 1967*, 332 I.C.C. 280, 299, this reduction was about five times the increase sought in that case. The railroads applied the full X-256 increase to the 772 scale rates, and propose to apply a 6-percent increase here. In the Southeast, however, specific increases, approximating 5 to 6.3 percent are to be applied. The actual differences in the increases for comparable movements are not substantial. Rates under the 772 scale, after application of the proposed increases, will range from 10.8 percent to 28.6 percent below rates available in 1960. Rates in the South are also affected by severe carrier competition.

[754] The increases proposed on feed and feed ingredients also apply on cottenseed and soybean cake and meal, cotton-

seed oil foods, liquid or solidified, nut or vegetable oil seed cake, and similar articles. The increases on these articles, which are jointly produced with vegetable oils, are opposed by the Texas Cottonseed Crushers' Association and the Institute of Shortening and Edible Oils, Inc. The primary objections are to the use of the STCC tariff, to which we have already referred, and to the application of a different increase on edible vegetable oil than on edible animal oil to be considered in a later section. It is asserted that the increases must be borne by the processors and cannot be passed on to the farm producers of the oil seeds. The increases appear reasonable and no reason is shown why these commodities should be exempted.

The Great Western Sugar Company produces dried beet pulp as a byproduct in manufacturing sugar. It is a feed ingredient and, after consideration of the company's protest, the respondents have agreed to include it in the feed and feed ingredient item of the tariff. In similar fashion, respondents have agreed to group plain wheat flour and self-rising wheat flour so as to take the same increase.

To the extent that rates to port cities have established relationships pursuant to orders of this Commission, as distinguished from relationships existing solely by virtue of voluntary carrier action, those relationships must be retained, and the respondents are expected to protect the lowest level on past shipments.

We conclude that the increases on grain, grain products, feed, and feed ingredients published in the master tariff are reasonable and may be applied as proposed, subject to the described limitation proposed in the connecting link supplements, except that in the West a greater percentage increase may not be made in the rates in effect on June 23,

1968, for the initial rail movement of grain from the country origin to the primary market than the lowest percentage increase made in the through rates in effect on the same date from such country origin to a destination beyond such primary market.

Sugar beets.—Increases of 5 percent in rates on sugar beets are opposed by manufacturers of sugar who contend that they have not been justified in relation to the costs of transportation of beets, and that they produce charges which yield more than out-of-pocket costs on shipments by some shippers and less than out-of-pocket costs on shipments by others. We have already [755] pointed out that these considerations are not appropriate in a general revenue proceeding. Further, mere rate differences alone do not establish a violation of the act. The protestants also call attention to the fact that beet sugar competes with cane sugar, many manufacturers of which are located at seaboard points and use imported raw cane sugar. Neither this factor, nor the fact that increases apply both on the sugar beets and the manufactured sugar, furnishes persuasive reason why any exemption from the increase should be ordered.

Great Western Sugar Company points out that its truck movement of beets increased from 22.4 percent of total tonnage in the 1966-67 season to 27.9 percent of total tonnage in the 1967-68 season. It asserts that approval of the proposed increases on sugar beets will result in additional diversion from rail to truck movement. Some diversion is to be expected and it may, as alleged, occur in this instance. We cannot say, however, that the increases will, in total, produce diversion of such magnitude as to nullify the expected additional revenues needed by the respondents.

Sugar.—The increase proposed on sugar is 6 percent, maximum 4 cents per hundredweight. Objections registered by certain protestants have to do with rate relationships which, as we have observed, may not be adjusted in this proceeding. The evidence fails to show that the increases will produce unlawful discriminations. As with numerous contentions of this same general nature made by many parties, the appropriate relief is by way of complaint proceedings directed to the specific problem. The Coca Cola Company opposes the increase in sugar rates, asserting that its use of freight cars is efficient and assists the respondents in effective utilization and cost reduction. If the increase is authorized, this protestant expects to readjust the movements to and from its various plants by all forms of transportation so as to incur the least possible costs. The rates on sugar in large cars, with carload minimum of 120,000 pounds, are shown to be lower now than in 1963, and lower than prescribed by the Commission in *Southeastern Sugar Investigation,* 132 I.C.C. 477 (1927).

We find the increases proposed on sugar and sugar beets to be just and reasonable.

Corn syrup and corn starch.—The Corn Refiners Association, Inc., protests the proposed 6-percent increase on its two principal products, corn syrup and corn starch. About 85 percent of [756] these products move by rail, mainly in long-haul transportation. The protestants object in particular to increases on corn syrup higher than increases on sugar in its various forms.

The protestants argue that corn syrup and cane and beet sugars are interchangeable for most purposes, and directly competitive in food uses, that the respondents have not justified the disparate treatment in the proposed increases

as between corn syrup and sugar, and that the rate increases for corn syrup should be no higher than those authorized for sugar.

The respondents contend that there has never been a recognized rate relationship between sugar and corn syrup. Corn syrup is produced chiefly in Illinois, Iowa, and Missouri. Sugar is produced at refineries on the eastern seaboard, in Louisiana, and in the far West. These refineries all compete in the Midwest where the distances from each area are approximately equal and maximum increases or hold-downs are required to preserve rate relationships. The same competitive situation does not exist on corn syrup since it is produced chiefly in the Midwest. The record indicates that even with the 6-percent increase on corn syrups, the actual increase in cents per pound on shipments to food processors would not exceed those on sugar from its producing areas.

The record supports the increases sought by the respondents. We therefore conclude that the proposed increases have been shown to be just and reasonable.

Corn starch is in competition with potato starch and wheat starch, and also with tapioca which moves almost 100 percent by motor carrier. About 1 billion pounds of starch is used annually in the manufacture of paper and allied products such as cardboard and corrugated board; and the textile industry also consumes many millions of pounds. The protestants contend that increases should not apply to the starch rates in western territory, including transcontinental territory, because the western railroads, in large part, have excluded grain and grain products from the application of the increases, and starch should be treated likewise. They also urge that, within eastern and southern

territories, maximum increases not exceeding 3 cents per 100 pounds be prescribed.

Considering the revenue needs of the respondents and the record presented here there is no sound basis for limiting the increases sought on corn starch. We conclude that the proposed increases on corn starch have been shown to be just and reasonable.

[757] *Fresh fruits and vegetables.*—Several associations of fruit and vegetable growers, individual growers, the state authorities mentioned previously, as well as various food retailers and processors, oppose the 5-percent increases sought on fresh fruits and vegetables.

The long-haul shippers from origins in California, Arizona, Texas, and the Pacific Northwest request hold-downs on increases from those origins. They claim that the flat increases proposed will result in higher increases per hundredweight on long-haul traffic from western origins to the benefit of growers in other areas, mainly in Florida. They contend that the present relationships between western origins and Florida origins will be distorted by the proposed increases.

The western growers of fruits and vegetables argue further that a flat *percentage increase* on fresh fruits and vegetables will cause serious diversion of this traffic from the railroads to competitive modes of transportation, and also that this type of increase will further widen the difference in rates between California long-haul traffic on these commodities, and traffic from Florida to the large eastern market cities, with a resultant loss of business to western growers of fresh fruits and vegetables. They contend that the need for the increases has not been shown and if any increases are allowed, a maximum hold-down should be

ordered, not only on per hundredweight rates but also on per-car rates.

The Western Growers Association points out that in 1966 on movements from California-Arizona origins of the nine largest moving vegetable and melon commodities to 41 American and 5 Canadian cities, the railroads hauled 57,411 carloads or 47 percent, while trucks handled 64,804 or 53 percent. In 1967 the figures were 52,031 or 44 percent by rail and 65,272 or 56 percent by truck, reflecting a decline by the railroads of 3 percent and 5,380 actual cars.

The Florida protestant associations of fruit and vegetable growers oppose the proposed increases on their commodities. Varying percentage increases are sought on the several types of commodities. For example a 5-percent increase is sought on fresh citrus fruits, except those moving on plan II TOFC. No increase is sought on fresh citrus fruits moving on plan II TOFC rates. Fresh vegetables except TOFC ramp to ramp take a 5-percent increase, while fresh vegetables TOFC, ramp to ramp take a 3-percent increase. Canned citrus products, [758] except TOFC ramp to ramp, take an increase of 6 percent while canned citrus products TOFC ramp to ramp take a 3-percent increase. Other similar claimed distortions of the rate structure occur on frozen and chilled citrus products, with some commodities at certain weights and to certain territories taking increases and some not.

The evidence indicates that the western growers, particularly from the California-Arizona area, dominate the eastern markets in many categories of fresh fruits and vegetables. Thus, the argument that hold-downs should be observed on such products from western origins in order to maintain the present rate relationships with movements of these products from Florida does not appear justified.

The percentage increases will not add a very significant increase in the present differential in rates between Florida and western origins. The evidence shows that the western producers of fresh fruits and vegetables will still be able to compete with growers in other regions and with home-grown products.

While the protestants generally argue that the increases sought will cause a diversion to motor carriers, with evidence being introduced as to the downward trend in carloadings from the west in 1967, after increases authorized in Ex Parte No. 256 went into effect, the record also shows that loads, for example, of vegetables and melons from California-Arizona origins moving by truck in 1967 also declined from the 1966 total. A decline in production and heavier loadings appear to be the cause of reduced carloading rather than increased rates.

The argument by Florida growers that increases should not be allowed on boxcar citrus rates because no increases were proposed on plan II TOFC citrus rates from Florida is not tenable since plan II rates have been increased 3 percent under Ex Parte No. 256, and later increased another 12 percent effective January 31, 1968.

The Florida growers assail the proposed increases on fresh fruits and vegetables and certain canned chilled and frozen citrus products, claiming that the rate adjustments on these products are complicated and should be examined in depth. The respondents have shown the competitive circumstances calling for the differences in proposed increases. For example, the 36,000-pound rates on frozen concentrates were not increased because of truck competitive influences and the 70,000-pound rates on frozen concentrates were excluded because of water [759] competitive

influences. The increases on fruits and vegetables are necessary if the railroads serving that territory are to receive sufficient compensation to enable them to maintain adequate service and to meet the increased costs.

In our judgment and taking into account the respondents' revenue needs, we find that the increases proposed on the commodities considered here under the heading fresh fruits and vegetables, are just and reasonable, and will not result in rates or charges in excess of a maximum reasonable level.

Canned, packaged and frozen foodstuffs.—The State authorities mentioned previously, associations of canners and freezers, retailers, and growers, oppose the 6-percent increase proposed on canned and frozen foodstuffs. They argue that with these increases the rail carriers will lose a large part of the increased traffic they have secured from these commodities since 1961 by the establishment of incentive rates, subject to minima of 100,000 pounds and higher.

The canners shipped over 16.7 million tons in 1965 and recognize that the railroads need some revenue relief, but not in the manner and extent sought here. Referring to proposed lesser increases of 5 percent on similar commodities such as fresh fruits and 4 percent on luxury articles such as cosmetics, for example, they claim that this disparate rate treatment constitutes preferential and prejudicial treatment for which no justification is shown. They contend also that the long-haul traffic is prejudiced by the proposed increases and that hold-downs should be applied on that traffic.

The respondents state that since 1947, canners have benefited from the establishment of low incentive rates, which have offset general rate increases over that period. They state that despite these lower freight rates, especially over the last 8 or 10 years, the market price of canned goods has

shown a continuing upward trend. They therefore believe that the canners have benefited from reduced freight rates and rising market prices for the period, and now should bear a fair share of the increases needed by the rail carriers. The respondents further believe that in view of the comparatively slight increase proposed here, and in light of the existing incentive rates, the possibility of diversion of traffic is minute.

The proposed increases in light of the evidence, and of respondents' revenue needs, in our judgment have been shown to be just and reasonable to the extent sought.

[760] *Wine.*—The Wine Institute opposes the 5-percent increase sought on wine. The principal volume of rail shipments of wine is from California to transcontinental territory. With the increase of 3 cents per 100 pounds authorized in Ex Parte No. 256, and the 5 percent sought here, protestants argue that the cost of rail movements from California to the principal eastern destinations will be increased within a year's period by 11 to 13 cents per 100 pounds. The increased transportation costs, the protestants contend, would depress further the already depressed state of the California wine industry, in competition with foreign and domestic wines, and could lead to a diversion of this traffic from rail to water which would be harmful to the railroads' own financial position.

The respondents show that the increases proposed, for example, to New York City, will only be 8 and 9 cents per 100 pounds, in packages, and in tank cars, respectively, amounting to ¾ cent per gallon. They also point out that while the number of wineries in California may have declined, production has increased from over 78.7 million gallons in 1963 to over 83.3 million gallons in 1967, and the

volume of wine transported to Atlantic coast destinations has also increased during this period.

The record shows the need for revenue increases by respondents, and the rate increases proposed have in our judgment been shown to be just and reasonable.

Trees, nursery stock, plants, seeds, et cetera.—The American Association of Nurserymen protests the 6-percent increase proposed on trees, shrubs, nursery stock, et cetera. It is asserted that the proposed increases are improper, arbitrary, and not justified; and that if any increase is allowed, it should be limited to a maximum of 4 percent. The Southern States Cooperative, Inc., opposes, among others, the increases on seed. It argues that any further increase in freight charges would subject the farming community to an even worse cost squeeze than it faces today.

The respondents contend that rates, for example, on seeds, have been reduced in the past, but that the preponderance of the traffic continues to move by unregulated motor carrier. They also contend that the increases are necessary in view of their revenue picture.

The evidence indicates in our judgment that the proposed increased rates on the concerned commodities are just and reasonable.

[761] *Walnuts.*—The Diamond Walnut Growers, Inc., protests the increases proposed on its products. About 41 percent of its products are shipped in the form of in-shell walnuts and 59 percent as shelled nutmeats. Walnuts in the shell are packed in burlap bags and load up to 70,000 pounds, or in 1-pound cellophane bags packed in cartons loading approximately 60,000 pounds per car. Shelled walnuts load approximately 65,000 pounds per car. Both shelled and in-shell walnuts are frequently loaded in the same car.

It is not disputed that traditionally in-shell and shelled walnuts have taken the same rates. The respondents propose to include shelled walnuts under the heading of confectionery or related products, which take a 6-percent increase, while on edible nuts in-shell a 5-percent increase is proposed. This results from the reclassification of nutmeats under the STCC groupings as a confectionery. It may be that there is justification for reclassifying nutmeats but on this record, evidence to this effect does not appear. The carriers concede that the question of reclassification could be given further study but that a revenue proceeding is not the place to deal with it. As we hold herein, it is similarly not the place to accomplish it.

While protestant also seeks hold-downs claiming the rates proposed discriminate against long-haul shippers, it appears that the increases do not change the alleged relationship with Georgia pecan growers to any material extent.

The increases proposed in our judgment appear just and reasonable except that the shelled and unshelled walnut rates should take the same increase of 5 percent.

Cocoa beans.—General Foods Corporation protests increases on loading charges and on line-haul rates on movements of import cocoa beans through Philadelphia, Pa., to Dover, Del. The loading charge increases are discussed under the section on accessorial charges. The 6-percent increase proposed in the line-haul rate appears fully justified in light of the respondents' revenue picture and in our judgment is just and reasonable.

Livestock.—The American National Cattlemen's Association and State affiliates oppose the 6-percent increases proposed on livestock. They argue that during the period 1947-66 there has been a decrease in volume of livestock traffic

so that, in 1966, rail revenue on this movement had declined to $29,200,918 or only 30.75 percent of that in 1946. They contend that since 1946 the rail livestock traffic has been substantially diverted to truck [762] movements, and that further diversion will result if the proposed increases herein are approved.

The respondents state that short-haul livestock traffic has been virtually completely diverted to motor carrier movements. The trend in the meatpacking industry has been to locate or relocate slaughter operations closer to the sources of livestock. This has had the effect of increasing the potential of trucking operations. The decentralization of packing plants coupled with the establishment of feed yards near slaughter plants has had an effect of reducing transportation of cattle by rail and truck for substantial distances.

Long-haul movements of livestock are not as susceptible to motor carrier diversions and the rail carriers have retained the traffic at longer distances. We are not persuaded that the proposed increases will cause further diversion of this traffic. In our judgment the record supports a finding that the proposed increases are just and reasonable.

Hides.—The Tanners' Council of America, Inc., objects to the proposed 5-percent increase on hides and skins. While generally objecting to any rate increase on hides, the protestant also points out that the ratio of payments for rail freight to hide and skin commodity values is relatively high, as compared with the past. This is caused, however, not by the increases in rail freight rates, but by the tremendous increase in cattle slaughtered during the recent past. In our judgment the record supports a finding that the proposed increased rates are just and reasonable.

Fresh meats and packinghouse products.—The proposed increases on fresh meats and packinghouse products are 5 percent, except when rates are published in cents per 100 pounds of 80 cents or less, in which case the increase is 2 cents per 100 pounds. Several meatpackers and the Department of Agriculture oppose the increase. The protestants, among other points, state that no credible evidence was introduced by respondents to show the basis for the proposed increases. They believe also that a large part of the present traffic in these commodities would be diverted to motor common carrier and private carrier; that rail traffic has substantially declined in recent years and will continue to do so if the proposed increases become effective; that the proposed increases would cause a decline in meat consumption and that the 2-cent hold-down for rates of 80 cents or less results in undue preference and prejudice.

The respondents point out that the principal rail movement of fresh meats is from western trunkline territory to eastern [763] territory; that the preponderance of this movement is long-haul traffic; that the rates on these commodities have had numerous reductions in recent years; and that various incentive rates reflecting higher minimum weights have been established. They contend that if the proposed increases are permitted to become effective the resulting rates will still be well below maximum reasonable levels. The 2-cent limitation on rates of 80 cents or less is designed to preserve respondents' competitive relationship with motor carriers on short-haul traffic. The rail carriers do not believe the increases proposed would cause diversion of their existing traffic, but in any event would consider future adjustments and reductions where required.

The evidence indicates a need for the increased revenue to be secured from the proposed increases. Based on the average rate from western trunkline to eastern territory, the increase would be only 8 cents per 100 pounds on these products. Under all the circumstances shown, in our judgment the proposed increases on fresh meats and packinghouse products have been shown to be just and reasonable.

Cheese.—The Kraft Foods Division of National Dairy Products Corporation opposes the increase of 6 percent on cheese. It contends that since 1960, due to the relative rate stability, rail tonnage and revenue from cheese traffic have gained substantially. Carload minimum weights were increased in this period, which resulted in increased per-car revenue. From 1963 to 1967 Kraft has increased its tonnage shipped by rail more than 60 percent and there has been a steady gain in the proportion of Kraft Foods cheese tonnage shipped by rail, with resultant reduction in tonnage handled by private motor transport. Protestant argues that the proposed increases will cause diversion to private motor carriers.

While some diversion may result, with the incentive rates in effect, such diversion would not appear to be significant. The evidence indicates the proposed rate increases to be just and reasonable.

Vegetable oils, lard, edible tallow, et cetera.—The Institute of Shortening and Edible Oils, Inc., and Anderson, Clayton Co., protest the proposed increases on vegetable oils, shortenings, lard, and other animal fat products. On vegetable oils and commodities grouped therewith in item 685 of the master tariff, the proposed increase is 1 cent on rates not exceeding 20 cents per 100 pounds, 2 cents on rates exceeding 20 cents but not [764] exceeding 40 cents per

100 pounds, and 6 percent on rates exceeding 40 cents per 100 pounds. On lard and certain meat products grouped therewith in item 595 of the master tariff, the proposed increase is 2 cents on rates 80 cents or less per 100 pounds and 5 percent on rates over 80 cents per 100 pounds. The institute states that its members paid the railroads $67.1 million in freight charges in 1967, including about $4 million for transit and accessorial charges, and that the proposed increases will cost them another $3,850,000, including about $250,000 in increased transit and accessorial charges, which, they say, would unduly burden their industry. The protestants also argue that no studies were made prior to the setting of the separate rate increases on these commodities, that the respondents have not submitted the quantum of proof necessary to meet their burden, and that, even if a revenue need is found by the Commission, the increase for vegetable oils and related commodities in item 685 should not exceed the increase proposed for lard and related commodities in item 595.

The respondents contend that there has been an increase in the per capita consumption of these commodities and that the proposed increases would only be a small amount per pound. They point out that lower incentive rates have been published to help the vegetable oil shippers and to meet carrier competition. They further show that, while lard is grouped with certain packinghouse products for the purpose of the proposed increase, ordinarily lard does not move on packinghouse products rates but rather on a lower specific basis at the identical level with vegetable oil shortenings. Such lower rates are the result of motor carrier competition.

Respondents have shown the need for revenue increases and these commodities must bear their fair share of such

increases. However, in view of the competition between lard and vegetable oils, which is recognized in the underlying rate levels, we will not approve a higher rate increase for item 685 than for item 595. With the exception noted, the proposed increases have been shown to be just and reasonable.

Wool.—On animal fibers, including wool, the proposed increase is 6 percent. The National Wool Growers Association opposes the increase, citing the possibility of diversion to truck movement, the heavier loading of wool in contrast with past practices, and in the competition from synthetic fibers. It is contended that the increase is unreasonable when compared with the 3-percent [765] increase on synthetic fibers. The respondents point out that rates on wool are lower than those found maximum reasonable in *Wool and Mohair Rates*, 276 I.C.C. 259 (1949), increased to the Ex Parte No. 256 level, and that incentive rates are available from the major producing areas in the Southwest. Rates on synthetic fibers are at a higher level than those on wool, and the difference in the increases will reduce only slightly the advantage now held by wool. Thus, for a movement of 2,000 miles, at a minimum weight of 40,000 pounds, the wool rate would increase from 156 cents per hundredweight to 165 cents; while the synthetic fiber rate would increase from 192 cents per hundredweight to 198 cents. No reason appears why animal fibers should not bear the increase as proposed.

Cotton.—Rates on raw cotton are proposed to be increased by percentages which vary according to the tariff minimum to which the particular rates apply. Rates subject to a tariff minimum weight of 35,000 pounds or less are to be increased 6 percent; those subject to a

minimum over 35,000 pounds to and including 50,000 pounds are to be increased 5 percent; and those subject to minimum over 50,000 pounds are to be increased 4 percent. Protestants assert that diversion of traffic to trucks will result from the increases but the respondents point out that rail movement of cotton has been reasonably stable for several years, and that movement by exempt truckers has certain advantages in particular areas which railroads cannot meet. Elsewhere, the rail service, which includes transit privileges is more desirable and is expected to hold the usual share of the traffic.

In 1967, about 95 percent of the cotton consumption was in Southeastern States, but some 85 percent of the production was in States in the Mississippi Delta area, the Southwest and on the Pacific coast. Rates on cotton to the Southeast have been held at a low level as the result of a series of reductions. In 1955 the rates from the Mississippi Valley area were reduced about 15 percent and since then, except for Ex Parte No. 223, no subsequent general increases have been applied. Generally these rates are lower today than those in effect in 1949 after the application of the Ex Parte No. 168 increase. Rates from the Southwest were reduced in 1956 by removal of the Ex Parte No. 175 increase plus 2 cents. The transcontinental 50,000-pound rate was reduced by 17 cents in 1956; and, in 1966, reduced rates at higher minima were established from the west coast.

The protestants also contend that the increase of 4 to 6 percent on cotton is unjust when compared with the increase of 3 percent [766] applied to synthetic fibers. Synthetic fibers increased their share of the total fiber market from 21.7 percent in 1950 to 45.6 percent in 1967,

during which period cotton's share declined from 68.8 percent to 49.2 percent. The respondents point out, however, that the annual consumption of cotton fibers has remained relatively stable, and that the increased use of synthetics is the result of consumer desires for blended fabrics, rather than relative transportation costs. The 5-percent increase results in increases of 4/100ths cent per pound to 6/100ths cent per pound on movements from Memphis, Tenn., and Lubbock, Tex., to Greenville, S. C. As noted in our discussion of rates on wool, rates on synthetic fibers are generally higher and the impact of the difference in increases will be to reduce somewhat the advantage of the cotton rates. The respondents point out that cotton moves for much longer distances than synthetics generally and on rates based on large groupings of origins and destinations rather than on mileage rates, which apply to synthetics. The difference in increase between these commodities cannot be found to violate the Interstate Commerce Act, and no reason appears why the proposed increases on cotton should be denied.

Hay and straw.—The National Hay Association, the New York State Hay and Grain Dealers Association, the United States Department of Agriculture, the New York State Department of Agriculture, Southern States Cooperative, Inc., and N. E. Lohr of Madison County, Va., protest the proposed 8-percent increase on hay and straw. They contend that the movement of hay is an essential segment of commerce, particularly during periods of drought, that the rate level on hay with the proposed increases is completely disproportionate to its value and is high compared with other commodities, that the rail rates on hay are fully compensatory without the increases, and that the railroads have an obligation to furnish equipment for the movement of

hay which they should not be permitted to evade by setting prohibitively high rates.

The rail respondents claim that little total hay production of the United States moves in interstate rail service, since most of it is either consumed on the farm or moved in short-haul unregulated motor carriage. Out of a total annual hay production of over 120 million tons, the railroads generally transport less than 200,000 tons. And since only about 15 percent of the total hay production tons enters commerce, the respondents argue that they are a minor factor in the handling of hay.

[767] The cost presentations of the parties do not clearly indicate the level of compensativeness of the rates on hay; but the evidence does indicate that, although hay and straw are low-grade commodities, they can bear a greater share of the revenue needs of the respondents than they are at present. While the 8-percent increase is higher than most of the proposed increases on agricultural commodities, it is not an unreasonable increase. Moreover, in periods of drought, we customarily authorize the establishment of substantially reduced rates pursuant to section 22(1) of the act. On all the evidence of record and in light of the respondents' revenue needs, we find the proposed rate increases on hay and straw to be just and reasonable.

Lumber and forest products.—On lumber and other forest products, the respondents propose an increase of 5 percent. Western producers urge that, if the increase is allowed, it be subject to a maximum of 2½ cents per hundredweight. Of particular concern to these producers is the competition of lumber from southern origins in the eastern and middle-western markets. To meet delivered prices, producers with higher transportation charges must absorb some portion

thereof. Application of the percentage increase to the higher rates for the longer hauls from western origins tends to increase the spread between total freight charges and enlarge the amounts which western producers must absorb. It is contended that the increases under Ex Parte No. 259 will result in appreciable reductions in eastbound movements of lumber and lumber products.

The respondents estimate that the proposed increase will produce some $31.8 million annually in increased revenues, and that the sought holddown of 2½ cents per hundredweight will reduce this to $15.2 million. Lumber, plywood, and forest products, in 1966, constituted 7.57 percent of the total revenues of class I railroads. The respondents point out that since 1946 rates on these commodities have been increased substantially less than on other commodities, that reduced incentive rates were published in 1961, and that, although no increase in rates occurred between 1960 and 1967, the wholesale price index of wood products rose 5 percent. It is estimated that the increase here proposed will result in an average increase of a little over 1 percent in delivered prices.

Lumber producers in the South enjoy lower rates due to their proximity to the eastern and middlewestern markets, and because of the availability of truck and water competition. Nonetheless, [768] although the spread in rates between the South and West has increased, the western producers continue to dominate the market. Between 1946 and 1967, softwood lumber production in the West rose from 14.4 billion to 20.9 billion board feet, while production in the South dropped from 9.4 billion to about 6.7 billion board feet. There has been a substantial increase in plywood production in the West in recent years. Generally,

throughout the East and central States, western production has accounted for one-half to two-thirds of the consumption of softwoods. We find that the differences resulting from the percentage increase on lumber and forest products as between these two producing areas are not unreasonable and that, in view of the importance of this traffic and the respondents' need for additional revenue, a holddown on the increase would not be proper. The increases are just and reasonable and are not discriminatory or unduly prejudical.

Woodpulp.—Importers of woodpulp oppose the 5 percent increase proposed on this commodity, asserting that railroads, at least in the East, do not provide heavy-loading incentive rates on import woodpulp, and referring to the reduction in tonnage imported from Scandinavia between 1959 and 1967. The respondents point out that loading of cars is done by the carriers or their agents, and that, due to a surplus of cars in the East, it is frequently more efficient to load two or more cars, rather than to load one more heavily. Woodpulp production in the United States has increased greatly in recent years, and it cannot be found that any decrease in import tonnage from particular foreign sources is related to railroad freight rates. We find the sought increase to be just and reasonable.

Pulpwood, paper, and paper products.—Proposed increases on pulpwood and wood chips, paper, and paper products, are similarly 5 percent. Protestants assert that heavier carloadings, increased volume, and reduced detention have so contributed to the carriers' revenues that the proposed increase should be denied. Cost evidence was offered which purported to show that the present rates exceeded full costs of the service. They were, however, based upon a number of studies whose reliability was

severely challenged. As we have heretofore observed, such a showing is of little probative value in a case of this type. The respondents point out that, notwithstanding the alleged competition from the plastics industry, paper manufacturers have increased gross sales by 100 percent since 1955 and enjoy a return of 9.8 percent. In the South, rates authorized in prior ex parte pro- [769] ceedings have not been taken in full in all cases, and reduced incentive rates have been published.

The protestants contend that paper and paper products are easily diverted to movement by truck, and that the proposed increase will have this result. The respondents show, however, that from 1957 to 1967, during which three general increases were published, rail participation in the movement of coarse paper, newsprint paper, and paperboard, fiberboard, and pulpboard increased appreciably. No reason is shown why these commodities should be exempted from the proposed increases.

Scrap and waste materials.—Rates on scrap and waste materials, which include such materials as waste paper and rags, textile wastes, scrap rubber, and scrap plastics, are proposed to be increased 5 percent. The National Association of Secondary Materials, Inc., representing over 600 members of the secondary materials industry and certain individual members of the association, oppose any increase in the rates on scrap and waste materials. The protestants assert that the industry generally does not have the power to control its prices, which are competitive with prices of virgin materials and other secondary materials. They assert that the industry is faced with the problem of mounting operating costs, particularly high labor costs, and increasing financial investments for materials handling

equipment and machinery to keep its plants in operation. At the same time it is a low net profit industry, many members of which operate at a net profit level of 2 percent or less. They generally forecast poor marketing conditions for the future. Protestants maintain that the industry does not have the ability or the flexibility to pass additional costs on to its consumers. Many smaller companies they assert, have had to cease operations because of ever-mounting costs. It is claimed that many shippers have invested in highway equipment which will tend to make diversion of traffic more permanent, that the railroads lost 15 percent of this business following the Ex Parte No. 256 increases, and that they will lose another 20 percent if the proposed increases are made. Protestants stress the favorable transportation characteristics of their traffic; heavy loading and heavy volume; regularity of movement; 2-way use of cars; ability to use standard (nonspecialized) equipment; no need for special services; and negligible loss and damage claims. They presented a comparison of rates on waste paper and rags at the Ex Parte No. 256 level with out-of-pocket and fully distributed costs, which indicates [770] generally that the present rates are compensatory. Protestants also contend that the proposed increases on their commodities are discriminatory because they are higher than the 3-percent increase proposed on allegedly competitive commodities, such as cotton linters pulp.

The respondents point out that the proposed 5-percent increase will apply uniformly in all territories and will preserve rather than reduce the marketing areas of these materials. Regarding the threat of diversion of this traffic to motor carriers, they observe that motor carrier operations are also experiencing increased costs, as is evident

by rate increases recently granted to the motor carriers. Respondents also point out that rail tonnage of scrap paper and rags increased from 3.2 million tons in 1957 to 4.7 million tons in 1966, which refutes the protestants' claim that past increases in rates have caused a diversion of rail tonnage. A study made by respondents on textile waste, scrap and wastepaper, and rubber and plastic scrap indicates that their traffic has remained steady or increased slightly in the years 1964, 1965, and 1966. Comparable statistics are not available for 1967 because of discontinuance of our waybill studies.

The Index of Average Freight Rates on Railroad Carload Traffic, Statement RI-1, published by the Commission's Bureau of Economics, shows that the average freight rate on scrap paper and rags (based on 1950 index as 100) declined from 132 in 1957 to 108 in 1963. With the proposed increases in rates in southern territory, cotton waste materials will move on lower rates than those in effect prior to December 10, 1959, except that rates will be 2 cents per 100 pounds higher at 900 miles. Rates on rags, minimum 40,000 pounds, between points in southern territory, including the proposed increases will be lower than those in effect prior to August 10, 1959. Respondents urge that it has been their policy to make rate adjustments wherever possible to prevent a loss of traffic to the railroads and that they will continue to do so. As an example, reduced rates on synthetic fiber waste within southern territory, minimum weights 60,000 and 100,000 pounds, were published and became effective August 10, 1968. The respondents realize that these materials require no special equipment and cannot stand excessive rates. They contend,

however, that railroad costs of operations are not confined to particular equipment, that even ordinary equipment, which is much in demand, represents a very substantial invest- [771] ment by the railroads, and that such equipment is not insulated from increases in cost.

In a proceeding of this nature, to the extent practicable, all rates and charges should bear a portion of the increased revenue needs of the railroads. Based on this record, we are not persuaded that the proposed increases in rates on scrap and waste materials will result in rates that exceed the maximum level of reasonableness or will create an undue burden on this traffic. Differences in increases on other commodities, alleged to be competitive, do not, without more, make the increases unlawful. We find the proposed increases on scrap and waste materials to be just and reasonable.

Fertilizer.—Proposed increases in rates on fertilizers are 3 percent, maximum 1 cent per 100 pounds, 20 cents per net ton, and 22 cents per gross ton. On superphosphate, the increase is 3 percent, maximum 5 cents per ton, net or gross, as rated. Increases on certain chemicals used in soil compounds are 5 percent, minimum 2 cents per 100 pounds. Rates on potash are to be increased 5 percent, subject to a limit of 53 cents per net ton from western territory to Florida and certain ports on the Gulf of Mexico.

Certain protestants have called attention to the fact that sundry components of fertilizers which have historically taken increases similar to fertilizers generally, have not been so treated in the X-259 master tariff. In reply, the railroads have expressed a willingness to revise the tariff as shown below so as to equalize these increases.

STCC No.	Commodity	Present Tariff Item	New Tariff Item
20-619-25	Beet or cane residuum potassium (potash)	520	605
20-713-17	Cocoa bean shells	580	605
20-939-60	Castor pomace	520	605
20-939-21	Tung nut meal	520	605
28-123-36	Sodium (soda) nitrate (chile saltpeter)	730	605
28-126-35	Calcium cyanamid	730	605
28-126-39	Calcium nitrate (lime nitrate)	730	605
28-191-10	Ammoniacal liquor or aqua ammonia, nec.	730	605
28-191-46	Ammonium phosphate, nec also applies on diammonium phosphate	730	605
28-191-49	Ammonium phosphate, monobasic, crude	730	605
28-191-55	Ammonium sulphate	730	605
28-191-58	Ammonium sulphate nitrate (leuna saltpeter)	730	605

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STCC No.	Commodity	Present Tariff Item	New Tariff Item
28-195-30	Ferrous sulphate	730	605
28-195-52	Ferrous ammonium sulphate, fert. grade	730	605
28-199-24	Sodium and potassium nitrate	730	605
28-199-71	Soil compounds consisting of more than one of the following: chlorides, limes, magnesia, manganese, phosphates, carbonates, iron oxide, potash, silicates, sulphates	730	605
40-291-27	Sludge, sewage, dry, fertilizer material (Nec-not elsewhere classified).	900	605

The respondents will be expected to make these revisions promptly.

The National Plant Food Institute and various producers of potash oppose the different treatment given this commodity. Potash is one of the three basic materials used in the manufacture of fertilizer. In the United States it is produced in New Mexico, Utah, and California, with New Mexico accounting for over 90 percent of the production. It is a low value and heavy loading commodity which, due to the location of the mines, moves almost exclusively by rail and in long-haul movements. About 23 percent of the domestic production is used directly as a fertilizer and about 72 percent is used in combination with other chemicals to manufacture mixed fertilizers. In Ex Parte No. 256 we concluded that the general information submitted with respect to potash did not establish that it should be excluded from the general increase in freight rates. On the other hand, our findings in that case also make it clear that no distinction was to be made between potash and other fertilizer materials in applying the increase. No justification has been given in this proceeding for the substantially higher rate increases sought to be assessed on potash than on other comparable fertilizers or fertilizer ingredients. No reason is given why potash should not be accorded the same consideration as has been given to other fertilizer ingredients which the respondents have agreed to include in master tariff item 605. We find that the application of a higher percentage increase on potash than on other fertilizers and fertilizer ingredients is unjust and unreasonable and that the increase on this commodity should not exceed 3 percent.

With the tariff revisions mentioned above, the fertilizer group increases are at the lowest level of all proposed in-

creases. Rates on fertilizers are below prescribed levels, and revenues per ton-[773]mile are the lowest since prior to 1950 on a nationwide basis. It is contended that all fertilizers should be held to the same increase as superphosphate. The limitation of 5 cents per ton on this item, however, reflects the extensive water competition from Florida origins which does not exist with respect to fertilizers generally. The record fails to show that this traffic should not bear some part of the additional revenue requirements of the respondents; and, except as above noted, the proposed increases are approved.

Phosphate Rock.—The increase of 5 percent, maximum 15 cents per net ton or 17 cents per gross ton, is objected to on the grounds that it will have an adverse effect on the fertilizer industry and will impose an additional cost on the farmer which could inflict immediate harm on the American Farm economy. It is claimed that phosphate rock is being asked to bear a disproportionate share of the general increase. The price of phosphate rock has been increased 30 to 50 percent during the period from 1956 to 1968. Yet, the present rates thereon are in many instances less than those in effect on June 1, 1956. In the circumstances we are convinced that the increase proposed is just and reasonable.

Construction aggregates, sand, lime and limestone.—The proposed increase on sand, gravel, crushed stone, cinders, slag, shale, limestone (except furnace limestone), and similar commodities is 6 percent, minimum 10 cents per net ton and 11 cents per gross ton, except in and to the South. To and within the South the increase, on rates not exceeding 100 cents per ton, net or gross as rated, is 15 cents per net ton or 16½ cents per gross ton; on rates over 100 cents and not over 200 cents per ton, the increase is 20 cents per net ton or 22 cents per gross ton; and, on rates over 200 cents

per ton, the increase is 25 cents per net ton or 27½ cents per gross ton. Like increases are proposed on brick or tile raw materials and crude shale. Rates on fluxing stone and furnace limestone are proposed to be increased 6 percent, maximum 15 cents per ton, net or gross, as rated. A flat 5-percent increase is proposed for shells, (oyster, crab, clam, et cetera). Rates on native asphalt or bitumens (asphaltic limestone) are proposed to be increased 6 percent.

The National Crushed Stone Association and numerous producers and users of these commodities object to the proposed increases and call attention to the greatly reduced participation of the railroads in the movement of this traffic, which they attribute to rates which have encouraged truck and water competition. [774] Demand for low-value construction aggregates is said to be highly elastic wherever the delivered rail price exceeds the delivered truck price from local origins. Rail shippers of these commodities contend that the proposed increases will have the inevitable result of contracting their marketing radius, with consequent loss of sales and diversion of more tonnage from rail to truck movement. A net loss rather than increase in railroad revenue is predicted. It is pointed out that the minimum increase of 10 cents per net ton results in percentage increases of as much as 20 percent in the lower rate brackets, and that the freight charges frequently exceed the f.o.b. price of the aggregate. U.S. Bureau of Mines statistics for crushed stone, other than stone used in the manufacture of cement and lime, indicate that between 1947 and 1967, production more than tripled while the percent of production moved by rail decreased from 36 percent to 13.3 percent. The protestants attribute this diversion to the increases in freight rates, and assert that the proposal in issue will have the same consequences.

One producer of crushed stone which sells its products in interstate commerce asks that we not permit the increase on interstate traffic until appropriate State regulatory bodies authorize the same increase on the intrastate movements employed by competing producers. In light of the clear showing here of revenue need we do not consider the imposition of such qualifications to be warranted in any orders to be issued in this case.

Construction aggregates have favorable loading characteristics but, as pointed out by the respondents, move, on the average, over short distances. Prior general increases in many instances, have not been taken on these items, or have been taken only partially. These factors combine to produce percentage increases which appear out of proportion when the minimum amounts are applied. It cannot be found, however, that the resulting rates are in excess of maximum reasonable rates. Whether the freight rates are the sole, or the primary cause of the reduction in rail movement is not certain. It appears undisputed that very small differences in delivered costs govern the source from which users procure these commodities; but the available statistics show substantial losses in rail movement during periods in which rail rates were not increased, and, in fact, during which competitive reductions were made. The respondents contend that the change in movement of the traffic arises out of the extensive development of sources of supply not located near rail [775] tracks, the expansion of highway building, dam construction, et cetera at points where rail delivery is not possible, and the development and use of portable plants at sources near points of use. It is also contended that truck rates have likewise risen and that the diversionary effect of the increases here proposed will be minimal.

Increases on lime, limestone, and limestone products are opposed by the National Limestone Institute, Inc., National Limestone Association, Glass Container Manufacturers Institute, Inc., American Glassware Association, various producers, steel manufacturers, sugar refiners, and others. Limestone is used as an aggregate in road building and construction materials, a fluxing material in the iron and steel industries, in the manufacture of fertilizers, the production of sundry chemicals, refining of sugar, et cetera. Contentions of protestants with respect to limestone are similar to those made with respect to aggregates generally. Oyster shells compete with limestone both as a construction aggregate and as a component of poultry feed. Shell producers contend that the combined effect of the increases in Ex Parte No. 256 and those proposed in this case is to disrupt competitive relationships and to discriminate against shells. The increases under consideration, however, are lower in certain instances on shells than on limestone.

On lime and lime plaster the proposed increases are 20 cents per net ton on rates not exceeding $6, and 4 percent on rates over $6 per net ton. It is contended that this prejudices producers of lime since the rates on the raw material, furnace limestone, are to be increased a maximum of 15 cents per net ton, thus encouraging users of lime to manufacture their own. The actual impact of this difference in rates is not apparent, however, since the 15-cent maximum applicable to furnace limestone is accompanied by a 6-percent increase in rates. As with industrial sand used in foundries, it is contended that lime used in water purification plants and paper manufacturing plants is now being reclaimed for further use, thus displacing possible shipments of new material. While cost factors would appear to be significant in a decision to embark upon a program of

reclaiming such materials, it does not appear that rail transportation charges have been a controlling factor. The development and use of alternative processes for manufacture of various commodities, such as the use of hydrocarbon processes in the production of acetylene, instead of lime, and the use of masonry cement in [776] place of masonry lime, appear to have little direct relation to the transportation costs of lime. In large part, the objections to increases on lime are directed to the failure to make similar increases on allegedly competitive products, particularly limestone. The extent to which these items are directly interchangeable in any particular use does not appear, however, and it cannot be said that the proposed increases actually produce any undue prejudice.

Steel producers oppose the increase on fluxing limestone, contending that this commodity, along with other steel industry raw materials, already contributes substantially and adequately to rail revenues. Lime producers also cite the prospect of construction of lime plants by steel producers to serve their own needs, thus eliminating movements from independent producers. As we observed in Ex Parte No. 256, lime can be used interchangeably with fluxing limestone in the manufacture of steel but the former is several times more valuable than the latter, which offsets the fact that smaller quantities need to be used. The respondents point out that the rates on lime and limestone are at a low level and have been the subject of numerous competitive reductions over the past years. The average rate per ton, U. S. to U. S., was $4.90 in 1965 compared to $6.20 in 1959. While the average load has increased, the average distance of haul and the average revenue per car have remained about the same. The respondents point out that lime plants built or acquired by steel producers have in some instances been

at substantial distance from the steel mills and still use rail movement. It is also shown that many lime plants located near steel mills have been those of independent producers.

The increases proposed on these commodities appear reasonable and no reason appears why they should be exempted from the general increase.

Industrial sand.—On industrial sand the proposed increase is 5 percent, minimum 10 cents per net ton or 11 cents per gross ton. Protestant producers of industrial sand and glass manufacturers assert that the increase is unjust and that diversion of the traffic to truck movement will result in net revenue losses to the railroads. The respondents point out that this commodity is of relatively high value, moves in closed cars or covered hopper cars having 100 percent empty return, and over long distances from a limited number of origins. The average rate per net ton declined between 1959 and 1965 from $3.72 to [777] $3.34, while between 1960 and 1966 the rail tonnage increased from about 18 million net tons to over 24 million net tons. We find the proposed increases on industrial sand just and reasonable.

Cement.—Rates on cement are proposed to be increased 2 cents per 100 pounds when in packages and 1 cent per 100 pounds in bulk, except that within and to the South the proposed increase on both bulk and package cement is 2½ cents per 100 pounds. In their brief, the respondents commit themselves to apply the proposed 2½ cent increase in the South on both package and bulk cement to the level of rates in effect prior to Ex Parte No. 256. The increases are opposed by the National Association of Cement Shippers and several cement manufacturers.

It is contended by protestants that the flat increases produce abnormal percentage increases when applied to the

shorter movements, that the increases will divert substantial traffic to truck movement and that the difference in treatment between package and bulk cement is unreasonable. It is also argued that market relationships of package cement will be disrupted since the increase of 2½ cents on shipments to the South must be added to the rates as already increased in Ex Parte No. 256, whereas package cement rates within the South were not increased in Ex Parte No. 256. The protestants assert that package cement moves in the oldest boxcar equipment, carrying the lowest per diem rates, in comparison to the more expensive hopper cars used for bulk movements.

In recent years cement manufacturers have made a substantial change in their methods of distribution. Instead of employing direct rail delivery to customers, volume movements of cement are now made to distribution terminals from which deliveries to customers are made by truck. Thus, Lehigh Portland Cement Company, which formerly moved some 95 percent of its production directly to customers by rail now delivers only 18 percent in this manner, but utilizes rail for the movement of about 42 percent of production to the distribution terminals. The protestants argue that higher rail rates may make it more economical to employ direct truck movements from plant to customer, with consequent loss of rail traffic to the distribution terminals.

It is also contended that the higher increase on package cement will disrupt existing relationships between the two methods of shipment. The respondents assert that package cement loads, on the average, to much lower weights than bulk cement and moves generally in different distribution channels. Rates in the South [778] and West are now higher on package cement than on bulk cement. Generally,

rates on cement are lower, even with the inclusion of the proposed increase, than prevailed in the early 1950's due to a number of reductions made between 1955 and 1965. The respondents contend that truck costs and rates have increased and that for the distances over which cement generally moves by rail, the rail rates will still be lower. While the flat increases produce percentage effects as high as 45 percent on movements under 30 miles, very little cement moves by rail for these distances. In 1965 only 3 percent of the interstate rail movement of cement was less than 50 miles and the average distances in the various territories were close to 200 miles. Minimum charges for carload service already exceed the charges based upon average loadings for distances under 50 miles and the proposed increases have little significance for such movements. It is pointed out that, although some older cement mills have been closed, they have been supplanted by new, modern facilities. Between 1956 and 1966, domestic shipments of cement increased 308 million to 380 million barrels.

In Ex Parte No. 256 we approved increases which ranged up to 3 cents per hundredweight and 60 cents per net ton. On rates over 10 cents and not over 30 cents per 100 pounds the authorized increase was 1 cent. This increase applied in most instances to the movements over 100 miles which constituted the preponderance of the traffic. In 1965, over 82 percent of interstate movements exceeded 100 miles. The increase now proposed on bulk cement, except in and to the South, is also 1 cent per 100 pounds. In the South, the application of the 2½ cent increase to the pre-X-256 rates on both package and bulk cement maintains the same relationships. The increase in other territories of 2 cents per 100 pounds on package cement, while higher than

that applied to bulk cement, does not result in unjust and unreasonable rates, and appears warranted by the differences in transportation characteristics. We find the increases proposed on cement, as set forth in the master increase tariff and modified by the commitment in the respondents' brief, are just and reasonable.

Fly ash.—Fly ash, a waste product produced by plants which burn coal, is used as an ingredient in making concrete. It competes with various other products for this purpose and less than 16 percent of that produced is so used, the rest being disposed of as a waste. The proposed increase in rates on fly ash is 6 percent, subject to minima and specific increases to and within the South as [779] set forth above for aggregates generally. The protestants compare this increase with the increase of 5 percent, maximum 15 cents per ton, which is proposed for the coal from which the fly ash is produced. They also point out that rates on coke breeze, a commodity physically resembling fly ash, is to receive the coal increase only. Fly ash is a low-value commodity with an average f.o.b. price on rail shipments of $1.50 per ton. On movements to the principal rail markets in the West and Southwest, the rail rates range from $7 to $13 per ton. We have heretofore found that transportation cost is usually the controlling factor in the disposal of fly ash. *Fly Ash, Chicago and Trenton, Mich., to Official Points*, 292 I.C.C. 349, 360; *Increased Freight Rates, 1967*, 332 I.C.C. 280, 328. The protestant urges that, if any increase is allowed on fly ash, it be restricted, in similar fashion as the coal increase, to a maximum of 15 cents per ton.

The respondents point out that fly ash competes with other aggregates and is to receive the same increase as

these products. Rates on this commodity are at a very low level, 9½ percent of first class, similar to cinders and industrial sand. In Ex Parte No. 256 we authorized a 5-percent increase on fly ash without limiting maxima. No reason is shown why this commodity should be exempted from the general increase, nor has it been shown that it should receive a holddown not applicable to other commodities with which it competes. Its value per ton, however, is less than one-third the value of the coal of which it is a waste product and in many instances, the proposed increase amounts to about 50 percent of the f.o.b. sales price. We find that the increase on fly ash should not exceed 3 percent over the basic rates.

Compressed or liquified gas.—Rates on butane, propane, and liquified petroleum gas are proposed to be increased 4 percent. Rates on liquified gases over other than butane, propane, and liquified petroleum gas are to be increased 6 percent. Rates on compressed or liquified industrial gases (except vinyl chloride), elemental gases, carbon dioxide, and acetylene are to be increased 8 percent. In the last group are included argon, helium, hydrogen, neon, oxygen, and fluoroethane gases, and various mixtures.

In recent years the use of oxygen has greatly increased, particularly in the steel industry. In 1956, 2.5 million tons were used, of which the steel industry used 1.1 million tons. In 1966, the total had increased to 11.7 million tons, of which steel plants used 7.1 million tons. The air-reduction method of producing this gas [780] makes it possible to locate plants without concern as to incoming raw materials, assuming the availability of a sufficient power supply. Thus, such plants frequently have been located close to substantial users, such as steel plants. In the air-reduction

process other gases, including nitrogen, argon, neon, and helium are produced at the same time.

Helium is also produced by the Bureau of Mines by extraction from natural gas and its primary user at present is the United States Government. It moves in tank cars as a gas, loading somewhat under 3,000 pounds per car, and moving under rates which provide for a minimum carload weight of 40,000 pounds. So handled, it can and does move substantial distances. This gas can also be liquified but since there is a practical limit of not over 48 hours in which it can be held in this state, movements as a liquid are confined to motor vehicle tank trucks and to distances limited by the time in transit. Possibilities of greatly increased commercial use of helium are indicated. Production and use of nitrogen and argon have also increased substantially in recent years.

It is contended that fluorocarbons compete with hydrocarbons such as butane and propane for use as dispersants and propellants; that prices of the former range from 19 cents to 57 cents per pound, whereas prices of the latter range from 5 to 8 cents per pound; and that an increase of 8 percent on the former while the latter are increased only 4 percent is unreasonable. The protestants fear increased use of the hydrocarbons in place of fluorocarbons if the rates on the latter, which are presently higher than those on hydrocarbons, are increased by the higher percentage. It appears, however, that the extent to which hydrocarbons are used in this competitive area is limited by certain inherent qualities, including odor, flammability, toxicity, lack of solubility, and thermal and chemical stability. It cannot be found that the alternative manufacturing possibilities of the hydrocarbons will be enhanced as a result of the pro-

posed rate increases or that fluorocarbons will be prejudiced thereby.

Generally, opponents of the rate increases cite the likelihood of diversion of the traffic to motor vehicle transportation. It is asserted that the increase may result in the conversion of the helium output of the Bureau of Mines to liquified gas and movement in tank trucks. Protestants also contend that the increases will engender development of new plants with local service provided by motor vehicle. At the same time, they assert that a continuing need for long-haul movement of liquid oxygen, nitrogen, and argon is to be [781] expected with a volume greater than in the past. The respondents point out that the overall rail movement of industrial gases has not decreased in recent years but that, notwithstanding various rate reductions at higher minima, the average loading per car has not increased. They attribute the failure of the railroads to increase their volume in relation to the increased output and use of compressed gases to the convenience and economics of decentralization, not to the rates for rail transportation. The protestants contend that many shippers supply their own cars for movement of these commodities and that claim ratios are favorable. The record fails to show any reason why compressed gases should not bear a proportion of the increased revenues of the railroads, nor can it be found that the rates as increased will be unlawful. While the increase of 8 percent is challenged as excessive in relation to the increases on other commodities, no substantial relationship was shown to exist, and no basis for a finding of undue discrimination, preference, or prejudice.

The protestants assert that, in the process of grouping commodities under the STCC code, certain liquid chemicals have been incorrectly assigned STCC numbers under the

generic heading of industrial gases. The record is inadequate to support definitive findings on this issue, but the respondents will be expected to take appropriate steps to ascertain and rectify any errors which are shown to have occurred.

Liquified petroleum gas.—Objections to the increase of 4 percent on liquified petroleum gas are substantially the same as were presented in Ex Parte No. 256. Attention is called to the industry's contribution of large tank cars and the prospect of diversion of traffic. The respondents point out that mileage allowances on private tank cars were increased in 1964 to compensate shippers for the new and larger equipment, and that incentive rates are published for the use of such cars. For a typical movement of 739 miles, the respondents point out that the proposed increase amounts to 7/10 of a mill per gallon. In southwestern and western trunkline territories, increases in 1965 were made on liquified petroleum gas to partially offset deficits due to the existing scale of rates applicable to that traffic. No persuasive reason appears why this commodity should be exempted from the general increase.

Petroleum products.—Rates on refined petroleum products in packages and in bulk are proposed to be increased 6 percent. Protestants object to the percentage application of the increase, asserting that it will disturb market relationships, and to the increase [782] on export movements. Increases in port charges due to increased costs, which do not apply on domestic traffic, provide no basis for exempting export traffic from bearing a share of general revenue increases along with all other traffic. Evidence as to market relationships and prospective diversion of traffic is not persuasive. The proposed increases appear reasonable, and necessary reductions to meet specific diversion situations

must be met by the respondents as they appear. Rates on petroleum wastes are to be increased 5 percent, minimum 2 cents per hundredweight. It is contended that these increases will result in diversion to barge transportation, or to elimination of movements which will no longer be economically feasible. While this a low-value commodity no basis appears for exempting it from the general increase.

Chemicals.—Rates on chemicals generally, soda ash, sulphate of ammonia, and vinyl chloride are also proposed to be increased 5 percent, with a minimum of 2 cents per hundred pounds. Rates on chlorine are to be increased 4 percent and on sulphuric acid and anhydrous ammonia, 3 percent, maximum 1 cent per hundredweight, 20 cents per net ton or 22 cents per gross ton.

Protestants assert that the proposed increases will result in diversion of traffic to motor and water transportation, and in the further development of decentralized manufacturing facilities. They introduced evidence to show that rates on chemicals are generally profitable to the respondents and constitute desirable traffic.

The respondents point out that no increase on chemical traffic to and within the South was taken in Ex Parte No. 256, other than on certain TOEC movements. They contend that the average increase on chemicals generally is less than 5 percent, that substantial numbers of requests for reductions in rates on chemicals are handled each year and that most are approved. Rates on movements in jumbo tank cars have been reduced below those for movements in standard tank cars.

The increases on a number of chemical items are challenged as discriminatory and disruptive of established rate relationships. Thus, on aqua ammonia (STCC 28-191-10),

an increase of 5 percent, minimum 2 cents per hundredweight, is proposed, while on anhydrous ammonia the proposed increase is 3 percent, maximum 20 cents per net ton. It is contended that, since the former is merely a water solution of the latter, it should take the same increase. It is contended that hydrochloric acid (STCC 28-1954-50) should not bear a greater increase than sulphuric acid (STCC 28-[783] 193-15). Similar objections are raised with respect to other materials. Differences in rates caused by the increases do not, standing alone, establish unlawful discrimination. In instances, however, where commodities have customarily been classified together for rate purposes, we do not consider a general rate increase proceeding an appropriate vehicle for altering such existing relationships. Thus, where the same rates have been applicable on items such as cleaning compounds and chlorinated hydrocarbons; or items such as calcium chloride, soda ash, and caustic soda, they should not be altered by the application of the proposed increases. The respondents will be expected to adjust their tariffs as necessary to apply increases on such of these items as have heretofore been rated alike so as to preserve their similar rate application.

Objection is made to the minimum increase of 2 cents per 100 pounds, provided for certain chemicals, including soda ash. It is contended that this results in discrimination against synthetically produced soda ash as compared with natural soda ash, since the former frequently moves over short distances and is thus affected by the minimum increase. Consequences of this nature, which are the product of marketing practices, do not render the rate increase unlawful. The increase applies to both types of soda ash.

As published, the master tariff X-259 applies higher increases to feed grade urea than to fertilizer grade urea.

The respondents have expressed a willingness to apply the lower fertilizer grade increase on feed grade urea. Similar corrective action will be taken on isobutane and in other comparable situations. Rates on commodities not assigned specific increases are generally increased 6 percent under item 100 of the master tariff. Shell Oil Company refers to a number of chemicals not listed in the Standard Transportation Commodity Code, which it contends should be grouped under particular numbers therein. Application of the 6-percent increase to these commodities is alleged to be discriminatory where competing products are assessed lesser increases under specific tariff provisions. The respondents will be expected to take prompt action to remedy all such omissions as well as others which are duly called to their attention.

Salt.—Respondents proposed to increase their rates on bulk salt by 5 percent, minimum 30 cents per net ton, except to and within the South, where the minimum increase proposed is 20 cents per net ton. On package salt, in all territories, flat increases in cents per 100 pounds are proposed. These amount to 5 cents on rates sub- [784] ject to minimum carload weights not exceeding 45,000 pounds; 4 cents on rates subject to minimum carload weights exceeding 45,000 pounds and not exceeding 60,000 pounds; and 3 cents on rates subject to minimum carload weights exceeding 60,000 pounds.

Protestants claim that the proposed increases are unreasonable because they are more drastic than the average 5 to 6 percent that the respondents are seeking generally; that in a general increase revenue proceeding there should be no distinction made between bulk and package salt; and that the different minimum increase proposed on bulk salt

to and within the South is unjustified. The salt industry is unanimous in claiming that we should grant the respondents only the lowest percentage increase consistent with their proven revenue needs, but in no event greater than 5 percent, maximum 2 cents per 100 pounds, or 40 cents per net ton, and that such increases should be uniform on all interstate and foreign commerce, both from a territorial standpoint and as between bulk salt and package salt.

Carload movements of salt within western territory east of the Continental Divide, southern territory, between those territories, and from official territory to western territory east of the Continental Divide and southern territory, is presently moved under multi-minima, incentive rates, commonly referred to as the "Banner Scales." These rates, initially established in 1962, apply on both package and bulk salt at minima of 45,000, 60,000, 80,000, and 120,000 pounds. While the rates prescribed in *Rate Structure Investigation, Part 13, Salt,* 197 I.C.C. 115 (1933) may still be used,[5] the incentive scales are moving the preponderance of the salt traffic.

Throughout the years the rates on salt have been given special treatment. For example, in the several general increase proceedings beginning with Ex Parte No. 175, *Increased Freight Rates, 1951,* 297 I.C.C. 17, and prior reports, to and including Ex Parte No. 212, *Increased Freight Rates, 1958,* 302 I.C.C. 665, while percentage increases varying from 3 to 15 percent were authorized generally, holddowns of 1½ cents to 3 cents per 100 pounds were imposed on both bulk and package salt. As recognized by us in *Increased Freight Rates, 1958,* 304 I.C.C. 289, 339,

5. Therein, different percentages of first-class rates were prescribed as maxima on bulk and package salt.

the special treatment given to the rates on salt has been a contributing factor [785] in keeping the rates on salt at a level lower than those on commodities generally.

Respondents here, under the form of a selective increase program, are attempting to maximize their revenues to the fullest extent possible without inviting traffic loss and without disrupting market relationships. The imposition of a minimum increase of only 20 cents per ton in the South was considered necessary because of barge competition. We have heretofore found in our interim report that the increases proposed by respondents will not exceed a maximum just and reasonable level of rates. Respondents claim that only through the use of the minimum on bulk salt and the flat increase on package salt can they receive a pro rata share of their costs from the salt industry. Despite contentions to the contrary, no good reasons have been offered for requiring the rates on bulk and package salt to be kept at the same level. In *Rate Structure Investigation, Part 13, Salt, supra,* the Commission prescribed different levels, based, among other things, on the facts that there was no competition between rock salt, which is predominantly shipped in bulk, and package salt; that each has differing transportation characteristics; and that package salt is of higher value. Protestants have not shown that these characteristics have changed. They claim that the low value of salt has definite limitations as to what the traffic will bear and that failure to provide maximum increases will hurt the smaller shippers of salt to the largest degree and encourage foreign competition. Respondents are ready and willing, voluntarily, to make competitive readjustments. Upon consideration of all the evidence, we are convinced that the rates on both bulk and package salt may be reasonably and

otherwise lawfully increased in the amounts proposed by respondents.

Furniture.—The respondents propose to increase the carload commodity rates on furniture on a sliding scale ranging from 4 to 7 percent.[6] General Services Administration, Westinghouse Electric Corporation, and a number of associations representing furniture manufacturers or dealers urge that the respondents have not justified the increases. They object to the different levels of increases, particularly the higher levels for longer hauls. They contend that the cost of moving furniture is also being increased [786] by more stringent packing requirements and increases in charges for accessorial services. The respondents point out that the lower increases would apply in the short-haul area where motor competition is greatest and that the proposed increases will restore rate relations existing prior to Ex Parte No. 223, resulting in a uniform 7½-percent increase over rates in effect prior to that increase. On articles of furniture weighing between 15 and 100 pounds the transcontinental increase would be between 7 and 46 cents, and for shipments hauled about 2,500 miles the increase would be about 2 cents per car-mile. They contend that risk of diversion is not great since motor carrier rates will be generally higher than the rail rates even with the increase applied. Furniture, it is noted, is high in value and subject to damage. No reason is shown why furniture should not provide a portion of the needed additional revenue. We find the proposed increases on furniture to be just and reasonable.

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6. On rates not exceeding 150 cents per 100 pounds the increase is 4 percent; on rates over 150 cents but not exceeding 200 cents per 100 pounds, 5 percent; on rates over 200 cents but not exceeding 400 cents per 100 pounds, 6 percent; and on rates over 400 cents per 100 pounds, 7 percent.

Household appliances and lighting fixtures.—Rates on these commodities are proposed to be increased 7 percent. Numerous manufacturers and associations of manufacturers oppose the increase, asserting that the traffic returns more than full cost to the railroads, and that diversion of traffic to private carriage is likely. Appliance manufacturers assert that they must compete with automobiles for consumer dollars, and point out that the increase on automobiles is 5 percent. Lighting fixture manufacturers assert that their product is a necessity of life and should be treated in the same fashion as drugs, window glass, soap, fresh vegetables, and canned foods. Neither of these contentions is responsive to the issues in this case. Respondents point out that the products involved are of high value and the loss and damage claims bear a high ratio to gross revenue. The articles are often transported in specialized equipment and the involved industries are shown by the evidence to have rates of return of about 13 percent. Prices charged by the household appliance industry were increased twice in 1967. No reason is shown why these commodities should not bear a portion of the needed additional revenues, nor is there shown any basis for a finding of unjust discrimination, or undue preference, or prejudice. We find the proposed increases on household and electrical appliances and fixtures just and reasonable.

Transformers and turbines.—Rates on electric transformers weighing 75,000 pounds or less which do not have dimensions requiring special type flatcars are proposed to be increased 4 per- [787] cent. On larger and heavier transformers, the proposed increase is 7 percent. On turbines the proposed increase is 6 percent. Various manufacturers, the National Electric Manufacturers Association and Gen-

eral Services Administration oppose the selective increases, contending that historically transformers and turbines have been given the same rate. They also assert that diversion of traffic to motor or water carriage is likely. Attention is also called to the 5-percent increase proposed for import shipments, asserting that domestic traffic will be prejudiced by the higher increases. Allis Chalmers Manufacturing Company estimates that it has lost 15 to 18 percent of its business to import competition and asserts that the increases will operate to the detriment of domestic shippers and aggravate the balance of payments problem. The respondents introduced evidence to show that only in a few instances are rates on imported transformers lower than domestic, and that the protestants enjoy the same import basis on their export shipments. There is no competitive relationship between transformers and turbines and no reason is shown why increases on these commodities should be related. The higher increase on heavier transformers is needed to meet the particular costs of moving these articles, including special cars, circuitous routing, blockage of adjacent tracks, et cetera. We find the increases proposed on transformers and turbines just and reasonable.

Glass and glass containers.—Rates on glass and glass containers are proposed to be increased 4 percent. The American Glassware Association and Glass Manufacturers Institute, Inc., oppose the increase, contending that it will divert more traffic to trucks. The respondents have published numerous reduced rates on these commodities to meet competition and the average carload rates have trended downward. Production of glass and glassware increased substantially between 1960 and 1966, and the industry as a whole has had a favorable rate of growth. No reason is shown why these commodities should not bear a portion of

the needed additional revenue. We find the increase proposed on glass and glass containers just and reasonable.

Metal and plastic containers.—Rates on metal cans and plastic bottles are proposed to be increased 7 percent. The Can Manufacturers' Institute opposes the increase, as well as the increase of 6 percent on can ends and 5 percent, minimum 2 cents per hundredpounds, on tin plate. It seeks a limitation of 4 percent in the increase on cans, similar to that on glass containers, and a limitation on can ends and tin plate of either 4 percent or 5 per- [788] cent, comparable to cullet and silica sand used as raw materials in the manufacture of the glass containers. Protestants also object to the increase proposed on plastic containers because it exceeds that applied to glass containers, asserting that it will result in diversion of traffic to private and contract motor carriers and in decentralization of the plastic fabricating industry. As noted above, rates on glass containers are depressed by motor competition; and there is no rate relationship between metal and plastic containers and glass containers. Transportation characteristics differ considerably, tin containers loading less than half as heavily as glass containers. There has been a substantial growth in the production and use of both types of containers in recent years. Between 1964 and 1967 plastic bottle shipments increased 42 percent. Pressure packaging in metal containers increased over 15 percent in 1967. While there are areas of competition between these products, the respondents contend that the choice of consumers is dependent upon a number of factors and the impact of differences in freight rates is not of great significance. No reason is shown why these commodities should not bear a portion of the needed additional revenues nor why similar increases should be

applied to them or to the raw materials which enter into their manufacture. We find the proposed increases on metal and plastic containers just and reasonable.

Chinaware and earthenware.—Rates on these commodities are proposed to be increased 6 percent. Protestants oppose the increase contending that it should not exceed the 4-percent increase proposed on glassware. While these commodities have many similarities in transportation characteristics, the movement of glassware is many times greater than chinaware. In 1964 rates on china table articles were reduced from $1.22 per hundredweight minimum 24,000 pounds to 77 cents per hundredweight, minimum 40,000 pounds. On an average carload, the rate differences resulting from the proposed increases are little over $7. We find that the proposed increases on chinaware and earthenware are just and reasonable.

Crude abrasives.—Rates on crude abrasives, crude aluminum oxide and crude silicon carbide are proposed to be increased 6 percent. Norton Company opposes the increase to the extent that it exceeds the increases applicable to bauxite ore or calcined or hydrated alumina. Rates on the latter are proposed to be increased 15 cents per ton, net or gross, on rates not exceeding $6.50 per ton, and 25 cents per ton on rates in excess of $6.50 per ton. The [789] protestant seeks to retain the relationship asserted to exist between bauxite ore and the intermediate products, alumina and aluminum oxide. While such relationships have been retained at times in the past, in Ex Parte No. 212, rates on crude abrasives were increased less than on bauxite ore. There is a substantial difference in the values of crude aluminum oxide and crude silicon carbide on the one hand and calcined alumina and bauxite ore on the other. The former commodities are

valued in excess of $135 per ton, while calcined alumina is valued at about $65 per ton, and bauxite ore at less than $10 per ton. No reason is shown why these commodities should be required to take similar increases. We find the proposed increases on crude abrasives just and reasonable.

Ground tripoli.—This commodity is included in item 1005 of the master tariff X-259, which provides for an increase of 6 percent. Protestant Carborundum Company contends that it is an abrasive similar to those included in item 650 and the respondents agree. They have offered to make an appropriate amendment to the tariff so as to reflect the same increase on tripoli as is presently provided for on ground silica. As with other such revisions, hereinbefore mentioned, respondents will be expected to take appropriate action to correct the tariff.

Miscellaneous commodities.—A number of protestants, including Outboard Marine Corporation, The Boeing Company, Aerospace Industries Association of America, Inc., Cities Service Oil Company, FMC Corporation, Steel Shipping Container Institute, Hobby Industry Association of America, Toy Manufacturers of America, Inc., Bicycle Institute of America, and Automobile Manufacturers Association, Inc., oppose the increases on various commodities. These include sewing machines, snow blowers, outboard motor boats, aircraft, aircraft parts, cellulose film, power sprayers, metal barrels, kegs, drums, pails, toys, bicycles, motor vehicles, and motor vehicle parts. They contend that the increases will result in diversion of traffic and, in some instances, that the items now return revenues in excess of out-of-pocket or fully distributed costs. Considering the established need for additional carrier revenue, the contentions of the protestants provide no basis for a finding that

any of the commodities in issue should be exempted from bearing their share of the proposed increases.

We have heretofore admonished the respondents, in their use of the STCC publication in connection with tariff adjustments, to promptly correct all instances in which established competitive groupings of commodities have not been observed. Except where [790] specifically otherwise stated we find the proposed increases just and reasonable. Statements of parties not specifically referred to herein, and concerning commodities not specifically referred to, have been considered in rendering our decision on the proposed increases in freight rates. The findings herein cover all statements and commodities in issue in this proceeding. Requested findings and exceptions not specifically reflected in our findings or conclusions have been considered and found not justified.

The panel of cooperating State commissioners,[7] the Honorable Vernon B. Derrickson of Delaware, the Honorable Charles J. Fain of Missouri and the Honorable Ralph H. Wickberg of Idaho have fully cooperated with the Commission throughout this proceeding and have advised with us in reaching our conclusions. We are authorized to state that they are in substantial accord with this report. The Honorable Edward L. Mason of Florida also participated in the earlier stages of the proceeding but he did not seek reelection and his term expired before our conclusions were reached.

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7. This panel was selected and appointed by the National Association of (State) Regulatory Utility Commissioners, upon invitation by this Commission, at the outset of this proceeding and were designed to be representative geographically of the eastern, midwestern, western, and southern areas involved in this proceeding.

ULTIMATE CONCLUSIONS AND FINDINGS

Upon consideration of the entire record in this proceeding, we conclude and find:

1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges, subject to the limitations and exceptions set forth below, are permitted to be continued or to be put into effect.

2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

[791] 3. Respondents may justly and reasonably be permitted to continue and to establish the increased interstate freight rates and charges approved in our interim report, except that in certain instances, for reasons stated in this report, different increases are shown to be just and reasonable, in which cases our prior ultimate findings are modified and the increases authorized are as set forth in findings 4 to 12, inclusive.

4. Respondents' basic freight rates and charges may be increased generally in accordance with the proposals as set

forth in Tariff of Increased Rates and Charges, X-259, issued March 11, 1968, as amended. By basic freight rates and charges are meant those in effect on June 23, 1968, whether established by order of the Commission or voluntary act of the petitioning carriers (including rates held under investigation and suspension orders). Basic freight rates and charges include also rates prescribed by outstanding order of the Commission when and as the rates therein prescribed become effective.

5. Minimum net line-haul revenue requirements for absorption of charges for switching at St. Louis, Mo., and East St. Louis, Ill., may be increased not more than 6 percent over those in effect on June 23, 1968.

6. On pig iron and iron and steel scrap, no greater percentage increase may be made in the basic rates than is made in the rates on iron ore in effect on the same date, nor shall the maximum increase per ton made on pig iron and iron and steel scrap exceed that made on iron ore.

7. On nonferrous scrap, the minimum increase in the basic rates shall not exceed 1 cent per 100 pounds, 20 cents per net ton, or 22 cents per gross ton.

8. On grain and grain products in the West, no greater percentage increase may be made in the basic rates for the initial rail movement from the country origin to the primary market than the lowest percentage increase made in the basic through rates from such country origin to a destination beyond such primary market.

9. On shelled walnuts the increase in the basic rates shall not exceed that applied to walnuts in the shell.

10. On vegetable oils and commodities grouped therewith in item 685, the increase in the basic rates shall not exceed that published for lard in item 595.

11. On potash, basic rates may be increased no more than 3 percent.

[792] 12. On fly ash, basic rates may be increased no more than 3 percent.

13. The increased freight rates and charges authorized herein will not exceed a maximum reasonable level, and the revenues derived therefrom will result in earnings and rates of return for the railways, as a whole and by the usual groupings, not in excess of that required to enable them to render adequate and efficient transportation at the lowest cost consistent with the furnishing of such service.

14. The increased freight rates and charges authorized herein will have no undue adverse effect on the movement of traffic by railway.

15. Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act.

16. An appropriate order will be entered (1) requiring the cancellation of the schedules under investigation herein

found not justified, without prejudice to the establishment and maintenance of schedules in conformity with the findings herein, and (2) modifying all our outstanding orders to the extent necessary to permit the maintenance of the increased freight rates and charges herein authorized, and granting relief from the provisions of section 4 of the act and our tariff publishing rules as may be necessary, including authority to publish and file tariff changes on not less than 5 days' notice.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of January 1969.

Ex Parte No. 259

INCREASED FREIGHT RATES, 1968

The Commission having this day made a report on further investigation containing its findings of fact and conclusions thereon, which report, and its prior [795] report and order of November 25, 1968, 332 I.C.C. 590, are hereby referred to and made a part hereof:

It is ordered, That the respondent railroads insofar as they participate in the traffic and have increased their rates, charges and minimum revenue requirements, as authorized in the Commission's order of November 25, 1968, shall cease and desist on or before February 15, 1969, from collecting basic rates increased to a greater extent than found just and reasonable herein, and from requiring minimum line-haul revenues as prerequisite to absorption of switching charges increased to a greater extent than found just and reasonable herein;

It is further ordered, That the respondent railroads be, and they are hereby, required to cancel the schedules suspended and placed under investigation by the order of June 19, 1968, to the extent not approved herein, on or before February 15, 1969, upon not less than 5 days' notice to the Commission and the general public by filing and posting in the manner prescribed by the Commission under the Interstate Commerce Act, without prejudice to the establishment and maintenance of schedules in conformity with the findings herein;

It is further ordered, That further changes in freight rates and charges, to the extent authorized herein, may be made effective upon not less than 5 days' notice to the Commission and to the general public by filing and posting in the manner prescribed in the act;

It is further ordered, That outstanding orders in other proceedings are hereby modified so as to permit establishment of the further changes in interstate freight rates and charges herein authorized;

It is further ordered, That all tariff schedules changing interstate rates or charges under the authority of this order, which rates and charges are now maintained or held in force by virtue of outstanding orders of the Commission, shall make specific reference to this order;

And it is further ordered, That the order entered herein on June 19, 1968, be, and it is hereby vacated and set aside; and that this proceeding be, and it is hereby, discontinued.

I.C.C. Final Order

SECOND SUPPLEMENTAL FOURTH SECTION ORDER NO. 20213

It appearing, That, the Commission, by fourth-section order No. 20213 entered June 19, 1968, as modified by supplemental fourth-section order No. 20213 entered November 25, 1968, authorized carriers parties to the proceeding, Ex Parte No. 259, *Increased Freight Rates, 1968,* 332 I.C.C. 590, to establish and maintain the increased rates and charges described therein without observing the provisions of section 4 of the Interstate Commerce Act;

It further appearing, That the Commission on this date has entered its further report in the same proceeding, authorizing certain increases and limiting other increases in rates and charges for the transportation of property over the lines of carriers parties to the proceeding within the United States, and that such increases or limitations cannot be published and made effective without producing in some instances rates or charges which yield greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, or greater compensation as a through rate or charge than the aggregate of intermediate rates or charges subject to the act, in contravention of section 4 [794] thereof; and that carriers parties to the proceeding have applied for relief from the provisions of section 4 to the extent necessary to establish the approved increased rates and charges, which fourth section order, as amended, prior orders in Ex Parte No. 259, the prior report, and the report of this date are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 20213, entered, modified, and amended as aforestated, be, and it is

hereby, further modified and amended by adding the following ordering paragraphs thereto:

It is further ordered, That carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby authorized to depart from the provisions of section 4 of the act to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte No. 259 of this date, January 9, 1969.

It is further ordered, That carriers parties to said proceeding be, and they are hereby, authorized to establish and maintain rates and charges authorized in the order of this date, January 9, 1969, without observing the long-and-short-haul provision of section 4 of the act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by failure of the State authorities to authorize the full increases permitted in said proceeding.

And it is further ordered, That in those instances in which rates and charges in contravention of section 4 of the act are established under the authority contained herein, the schedules containing such rates and charges shall make reference to this order in the manner required by rule 28 of Tariff Circular No. 20.

I.C.C. Final Order

AMENDMENT OF SPECIAL PERMISSION

NO. 68-4000

WAIVER OF TARIFF PUBLISHING RULES

It appearing, That on March 8, 1968, the Commission entered Special Permission No. 68-4000, amended June 19, 1968, authorizing carriers parties to the above proceeding to depart, to the extent specified in said special permission, from the Commission's tariff rules in publishing increases in freight rates and charges as provided for in such special permission, as amended.

It is ordered, That said special permission, as amended, be, and it is hereby further amended to permit the establishment, in the same manner and subject to the same limitations, including the expiration date, as therein provided, of the changed increases in freight rates and charges authorized by the Commission in its report and order of this date, January 9, 1969, in said proceeding.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

ALABAMA POWER COMPANY, et al.,

Appellants,

v.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

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BRIEF OF AMICUS CURIAE THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF AMICUS CURIAE THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

The National Industrial Traffic League, *amicus curiae*, having obtained consents from each party, submits this Brief in support of the Jurisdictional Statement filed by the appellants. Appellants appeal from the judgment of the United States District Court for the District of Columbia, entered on December 18, 1969, which on Jurisdictional grounds alone, dismissed a complaint instituted by several groups of shippers to enjoin, annul and set aside certain rate increase orders of the Interstate Commerce Commission entered Novem-

ber 26, 1968 and January 9, 1969 in Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 I.C.C. 714. This Brief is submitted in support of the Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

The National Industrial Traffic League, *amicus curiae*, is a nationwide organization of shippers and receivers of freight of all descriptions handled by all modes of transportation. Among its members the League also includes chambers of commerce, boards of trade and other associations of shippers. Members are located in all regions of the country. The League provides the broadest membership of any organization of shippers. It thereby represents the broadest coverage of all those directly affected by the Commission's decision placed in issue. The shippers represented by the League are those whose personal stake in the level of charges paid for rail freight transportation is directly affected by the Commission's decision approving a general increase in that level of charges. The National Industrial Traffic League was formed in 1907 for the purpose of providing representation for shippers on matters of national transportation importance. The ability of parties to proceedings before the Interstate Commerce Commission to obtain judicial review of Commission decisions authorizing and approving a nationwide general rail freight rate increase is such a matter.

OPINION BELOW

The opinion of the United States District Court for the District of Columbia is not yet officially reported. A copy is attached to the appellant's Jurisdictional Statement as Appendix A thereto. The initial and final reports of the Interstate Commerce Commission are reported at 332 ICC 590 and 332 ICC 714, copies of which reports are attached to the Jurisdictional Statement as Appendices B and C, respectively, thereto.

JURISDICTION

The complaint below was brought under 28 U.S.C. §1336, to set aside an order to the Interstate Commerce Commission. The judgment of the District Court dismissing the complaint for lack of jurisdiction was entered on December 18, 1969, and notice of appeal was filed in that court on February 4, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *City of Chicago v. United States*, US, 24 L. Ed 2d 340 (1969), *American Trucking Association, Inc. v. Atchison, T. & S.F. Ry.*, 387 U.S. 398 (1967); *United States v. Drum*, 368 U.S. 370 (1962); *Frozen Food Express, Inc., v. United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

Sections 551, 702 and 704 of Title 5, United States Code, The Administrative Procedure Act; Section 1336 of Title 28, United States Code; and Sections 13, 15(1), 15(7) and 15a(2) of the Interstate Commerce Act, as amended, are set forth in Appendix D to the appellants' Jurisdictional Statement.

QUESTION PRESENTED

As stated by the appellants, the question presented is: May shippers, both individually and as a class, be denied judicial review of Commission orders, entered after hearing and investigation, insofar as they authorize across-the-board increases in the level of railroad freight rates and charges, and modify outstanding rate orders and grant Fourth Section relief to the extent necessary to permit the increases to become effective?

STATEMENT OF THE CASE

The Proceedings Below

The proceeding in the court below was instituted by several groups of shippers to enjoin, annul and set aside certain rate increase orders of the Interstate Commerce Commission entered November 26, 1968 and January 9, 1969 in Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 ICC 714. These orders permit the railroads of the United States to effect a general increase in their freight rates and charges which averaged about 5 percent, but differed as between commodities between 3 percent and 10 percent, for a total increase of approximately $450 million per annum.

The National Industrial Traffic League, *amicus curiae* herein, was a protestant and participated actively throughout the proceedings before the Interstate Commerce Commission. It presented evidence through two separate verified statements of a Transportation Economist. However, its participation related only to the general issues as to the overall revenue need and the justness and reasonableness of the overall increase. Its active participation was basically in the sub-number 2 proceeding designated by the Commission as "Railroad Cost and Revenue Needs." The issues in Sub-numbers 3 et al dealt with the increases as they applied on particular commodities. As a national association of shippers, chambers of commerce and boards of trade located throughout the country and using all modes of transportation, including railroads, and with interests relating to all commodities, the League did not participate in the sub-numbered proceedings dealing with specific commodity application of the general increase in issue.

The three-judge statutory District Court by a two-to-one vote (Circuit Judge J. Skelly Wright, dissenting) dismissed the complaint on the ground that "it lacks jurisdiction to review the questioned Commission orders," citing the 1935 decision in *Algoma Coal and Coke Co. v. United States*, 11 F Supp. 487 (E. D. Va.), as controlling. In concluding that it

lacked jurisdiction the Court below relied on the views that the Commission's Orders were "permissive general increase orders," "the rates which have become effective under the I.C.C. Orders are permissive and not mandatory," "the freight rates and charges authorized are not considered as prescribed," individual plaintiffs could "challenge any particular rates which affect them under the procedures provided in Section 13 of the I.C.C. Act," i.e. by filing a specific complaint and pursuing it to its administrative conclusion, and that collateral Section 13 remedy of a formal complaint "has not yet been exhausted."

THE QUESTION IS SUBSTANTIAL

The importance of the case is indicated by the fact that operating revenues of Class I line-haul railroads in the United States are in excess of ten (10) billion dollars per year. Either directly or indirectly every business and every consumer is affected by the general level of railroad freight rates. Public confidence in this process by which such vast areas of regulated prices can be raised requires that the public, a shipper or receiver or other party to the Commission's procedures, be able to obtain judicial review. The ability to assert some measure of judicial control over the process whereby the railroads are able to effectuate overall increases in the general level of freight rates is a matter of substantial economic and legal importance. The process should be subject to judicial controls through judicial review of the administrative action.

Significantly, neither the Interstate Commerce Commission nor the Department of Justice, the defendants below, took the position that the courts lack jurisdiction to grant the judicial review sought by the complainants below. The Interstate Commerce Commission defended its Order on the merits having "expressly waive[d] the defense, suggested by *Algoma Coal and Coke Co. v. United States*, 11 F. Supp. 487, 495-6 (E.D. Va. 1935), that [28 USC §§1336, 2284 and 2321-2325] do not confer jurisdiction over the permissive

orders entered by the Commission . . ." (ICC Answer, page 1, Brief, page 7). It is only the railroad respondents before the Commission, intervening defendants in the Court below, who question the jurisdiction of the court to provide judicial review.

Judicial Review Of The Commission's Action Is Not Precluded

There is no express statutory exclusion of review from a decision and order of the Interstate Commerce Commission including the decision and order in this proceeding, authorizing and approving a general rate increase for railroads. Nothing to that effect was cited by the Court below or by the railroads in urging a lack of jurisdiction.

The statutes provide for judicial review. Jurisdiction is conferred on the District Courts to set aside, annul, enjoin, etc., orders of the Interstate Commerce Commission, specifically Section 1336 of Title 28 of the United States Code. 28 USCA §1336. The Interstate Commerce Act in Section 17(9) specifically contemplates "a suit to enforce, enjoin, suspend or set aside" a decision, order, or requirement, in whole or in part, of the Commission and further contemplates that such a suit may be brought in a court of the United States under applicable provisions of law. 49 USCA §17(9). Section 17 of the Interstate Commerce Act in all of its paragraphs deals generally with the questions of Commission procedure, the delegation of duties, separations into divisions, the handling of proceedings, including the submission of written reports with respect to matters involving the taking of testimony of public hearings, rehearings, reargurnents and reconsiderations, stays pending disposition of applications for reconsideration, etc., USCA §17(9). These general procedures including the provision for court appeal set forth in Section 17(9) follow in sequence the provisions of Section 15 setting forth the Commission's investigation procedures. Section 17 follows and applies equally to the alternative proceedings before the

Commission instituted as investigations, under Section 15 of the Act, the procedure in this case.[1]

The Administrative Procedure Act specifically provides that agency action, including an agency such as the Interstate Commerce Commission, is subject to court review, 5 USCA §§ 702, 704. The Administrative Procedure Act has been described as containing "generous review provisions" which "must be given a 'hospitable' interpretation" so that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 139, 140. Cf. *Association of Data Processing Service Organizations, Inc. v. Camp*, 38 Law Week 4193 (No. 85, October Term, 1969, decided March 3, 1970); *Barlow v. Collins*, 38 Law Week 4195 (No. 249, October Term, 1969, decided March 3, 1970).

The Decision of the Court Below Denying Judicial Review Is in Conflict with Review Generally Granted Decisions of Administrative Agencies Including Those of the Interstate Commerce Commission

Only persuasive reasons should prevent judicial review. This Court discussing review of I.C.C. decisions, has recently stated in *City of Chicago v. United States*, ___ U.S. ___, 24 L.Ed. 340, 343 that:

> ". . . We start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose."

A noted author has expressed the same concept with the proposition that "in our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at

[1] The Commission's initial report, 332 I.C.C. 590, 595, indicates that the investigation was being partially conducted under the provisions of Section 13 of the Act. 49 USCA § 13(3).

some point a judicial determination on its validity." Jaffe, "Judicial Control of Administrative Action." Little, Brown & Company, Boston, 1965, page 336.

This Court recently re-emphasized these principles strongly favoring judicial review in *Association of Data Processing Service Organization, Inc. v. Camp*, 38 Law Week 4193; and *Barlow v. Collins*, 38 Law Week 4195 (Nos. 85 and 249, October Term, 1969; both decided March 3, 1970).

The decision of the Court below is in conflict with cases, many from the same circuit, reviewing closely analagous decisions from other regulatory agencies. Parties before other agencies have been able to obtain judicial review of decisions from their respective agencies dealing with matters quite comparable to the general rail increase which was the subject matter of the complaint below. General rate increases by power companies or natural gas companies regulated by the Federal Power Commission have been subjected to judicial review. *Lynchburg Gas Company v. FPC*, 336 F. 2d 942 (D.C. Cir., 1964); *City of Pittsburgh v. FPC*, 237 F. 2d 741 (1956). General rate investigation decisions of the Federal Communication Commission are reviewable. *Wilson & Co., Inc. v. United States*, 335 F. 2d 788 (7th Cir., 1964) *cert. denied*. 380 U.S. 951; *American Trucking Association, Inc. v. FCC*, 377 F. 2d 121 (D.C. Cir., 1966) *cert. denied*, 386 U.S. 943. Civil Aeronautics Board decisions involving general rate investigations are subject to judicial review. *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466, 476 (5th Cir., 1967) *cert. denied*, 390 U.S. 920. Federal Maritime decisions dealing with general rate increases are subject to judicial review. *Government of Guam v. FMC*, 329 F.2d 251 (D.C. Cir., 1964); *Puerto Rico v. FMC*, 288 F.2d 348 (D.C. Cir. 1961).

The decision of the Court below conflicts with decisions providing judicial review of other I.C.C. decisions. Commission decisions entered in rate investigation proceedings have

consistently been subjected to judicial review. *Central and Southern Motor Freight Tariff Assn. Inc., v. United States*, __ F.Supp.__, 1969 Federal Carriers Cases No. 82, 107 (N.D. Ga., 1969), reviewing Investigation and Suspension Docket No. M-22165, *Delivery Charges on LTL Shipments To Points in Florida*, 332 I.C.C. 892 (1968); *Ryder Truck Lines, Inc., v. United States*, __F.Supp. __, 1969 Federal Carriers Cases No. 82, 161 (M.D. Fla. 1969), reviewing I. & S. Docket M-21914, *Pickup Charges, Ryder Truck Lines*, 335 I.C.C. 39 (1968) and Docket No. 34915, *Arbitrary Charges On Shipments From Georgia to Florida*, 335 I.C.C. 209 (1969); *Ringsby Truck Lines, Inc. v. United States*, 263 F.Supp 552 (D. Colo., 1967), appeal dismissed as moot 389 U.S. 576 (1968), reviewing Docket 34662, *Increased Class & Commodity Rates, Transcontinental*, 326 I.C.C. 397 (1966); *Accelerated Transport-Pony Express, Inc., v. United States*, 227 F.Supp 815 (D. Vt., 1964) aff'd. *per curiam*, 379 U.S. 4 (1964), reviewing Docket 33652, *General Increase - Middle Atlantic and New England Territories*, 319 I.C.C. 168 (1963); *Saginaw Transfer Co. v. United States*, 275 F.Supp. 585 (E.D. Mich., 1967), reviewing Docket No. 33978, *Chemicals In Aggregate Shipments–Midland, Michigan to the East*, 326 I.C.C. 657 (1965).

Declaratory orders of the Commission are reviewable. *Keller Industries, Inc. v. United States*, 304 F.S. 852 (N.D. Fla. 1969); *Pennsylvania RR. v. United States*, 363 U.S. 205 (1963).

The decision below was inconsistent with the judicial review granted in *Boston and Maine Railroad v. United States*, 162 F.Supp. 289, 292, n. 4 (D. Mass., 1958), appeal dismissed, 358 U.S. 68, wherein the court had provided judicial review and remanded a decision of the Commission finding that per diem charges were not in excess of reasonable compensation during the period which they had been in.

effect and that "the latter charge is not in excess of reasonable compensation for present use."

Ex Parte docket investigations, including general rulemaking proceedings, are reviewable. *Northern Freight Lines v. United States*, 304 F.Supp. 536 (N.D. Ga., 1969) reviewing Ex Parte No. 242, *Express Company Terminal Areas*, 332 I.C.C. 91 (1967); *American Trucking Assn. v. Atchison T.&S.F. Ry.*, 387 U.S. 397 (1967) reversing 244 F.Supp. 955 (N.D. Ill., 1966) reviewing Ex Parte 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders*, 322 I.C.C. 301 (1964); Cf *Frozen Food Express v. United States*, 351 U.S. 40 (1956).

The denial of judicial review below is contrary to this Court's very recent decision in *City of Chicago v. United States*, 24 L.Ed.2d 340 (1969), granting judicial review of and ICC order terminating an investigation of a proposed passenger train discontinuance.

The Investigation Remedy Was Exhausted: The Commission's Decision Is Ripe For Judicial Review.

The specific administrative remedy involved, i.e. a general investigation of the lawfulness of the total amount of the increase and its general manner of apportionment, has been completed. The Commission's action being attacked in the Court below was an administratively final determination. Hearings had been provided, cross-examination had been completed, briefs had been presented, oral arguments had been heard, a full written report and order had been adopted. No further action by the Commission was required, available, contemplated or possible. Other than under extraordinary rule relief, the Commission's procedures did not permit the filing of any further papers. The Commission's administrative procedures by which parties could challenge the Commission's conclusions as to the lawfulness of the overall increase had been exhausted.[1]

[1] In a Section 13 complaint proceeding challenging the specific application of a general rail increase to particular rates the Commission

The Commission's report herein dealt with the merits. It should not be said that a Commission's decision that increases should not be allowed is a reviewable decision, while an answer like that here saying the increase shall be allowed is not a reviewable decision. Cf. *City of Chicago v. United States*, 24 L.Ed.2d 340, 344 (1969), where this Court said:

> A decision to investigate indicated that a substantial question exists under the statutory standards. The Commission's report therefore deals with the merits. We cannot say that an answer that discontinuance should not be allowed is agency "action," while an answer saying the reverse is agency "inaction." The technical form of the order is irrelevant. In each case the Commission is deciding the merits.

The Commission's decision is in a justiciable form to be considered ripe for review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-9 (1967). This is not an abstract disagreement. The vital interests of the Appellants are affected. The withholding of court consideration works a severe hardship on the appellants as well as other parties to the Commission proceeding. As clearly seen by Judge Wright in his dissent, the alternative complaints are neither reasonable nor feasible, involving as they do a great multiplicity of individual rate cases separately attempting to challenge the correctness of the overall increase. Judicial review of the Commission's decision are that issue should have been provided by the court below.

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has stated that "whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." *Kappers Co., Inc. v. Chesapeake & Ohio Ry.*, 303 ICC 383, 387 (1958).

Algoma Is Not Controlling

The lower court's reliance upon *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487 (E.D. Va., 1935), is misplaced and contrary to the widely recognized right of parties to obtain judicial review of agency action. *Algoma* involved a suit by a limited number of the parties to the case before the Commission to enjoin the Commission's action in approving a general increase only insofar as it applied to the rates on their movements of coal. They did not make an overall attack upon the propriety of the Commission's conclusion or findings with respect thereto relating to the total general increase. *Algoma* incorrectly attempted to make a distinction between rates prescribed and permitted by the ICC. Subsequent cases subjected to judicial review and considered by this Court have involved carrier made rates approved by the Commission yet not prescribed by the Commission. The distinction for the purposes of judicial review was not one that had been recognized prior to *Algoma* nor was it one that has been recognized subsequent to *Algoma*. Nor is it clear that the Court in *Algoma* actually rested its conclusion on an alleged lack of jurisdiction to grant judicial review, since it clearly went on to consider at some length the issues raised on the merits relating to: the adequacy of preliminary findings, the Commission's authority and the exercise of its administrative discretion in finding a special case under the Fourth-Section, the lack of a showing that the orders prejudicially affected the plaintiff; and the scope of administrative discretion in deciding whether or not to suspend rates.

With respect to the jurisdictional conclusion, if that was the basis of *Algoma*—a position not fully supported by the decision itself, the court in *Algoma* cited no prior cases by this Court nor any statute precluding judicial review of the Commission's decision. Its reliance upon *Birmingham Slag Co. v. United States*, 11 F.Supp. 486 (M.D. Ala., 1935) and *Pitzer Transfer Corp. v. Norfolk & Western Ry. Co.*, 11 F.Supp. 436 (D. Md. 1935), is neither clear nor properly

placed. *Birmingham Slag* is a case in which an injunction seeking to restrain "certain named carrier defendants from acting in pursuance of certain orders of the ICC" and thus was an attempt to have the Court act in suspending the rates as opposed to a suit to enjoin, annul, or set aside a Commission determination. *Pitzer* was totally inapposite since it involved a suit by a shipper to enforce a Commission order determining that the rate paid was unreasonable and excessive and ordering reparation. *Algoma* is premised on the failure of the Commission to suspend the rates, "a matter within the administrative discretion of Commission, not now reviewable in the courts." 11 F. Supp. 487 at 495. This basis of the *Algoma* decision is consistent with subsequent decisions in which the courts have been held to lack jurisdiction to review a discretionary withholding by the Commission of its power to suspend. *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963), and cases cited therein.

The Court in *Algoma* emphasized that granting relief to the plaintiff therein with respect only to the coal rates in issue in that case would have created a discriminatory situation. 11 F. Supp. at 496. But this is not the situation raised in the case below where no specific application was attacked but the general increase as a whole was placed in issue.

The decision of the Court below and *Algoma* upon which it relies have both failed to make the analysis required by the Administrative Procedure Act, 5 U.S.C. § 701(a), as to whether the statutes precluded judicial review or the agency action was committed to agency discretion by law. No attempt was made to analyze the essential situation to determine whether or not the presumptions in favor of review contemplated by the generous review provisions of the Administrative Procedure Act were overcome.

CONCLUSION

In view of the direct conflict between the decision of the court below and the principle in this Court's recent decisions in the cases of *City of Chicago v. United States*, 24 L.Ed.2d 340 (1969); *Association of Data Processing Service Organizations, Inc. v. Camp*, 38 L.W. 4193 (1970); and *Barlow v. Collins*, 38 L.W. 4195 (1970), it appears appropriate for the Court either to summarily reverse the decision below, directing a consideration of the case on the merits below, or note jurisdiction and consider the merits of the substantial questions presented concerning the judicial reviewability of administrative decisions.

Respectfully submitted,

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Nos. [illegible] and [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1969

ALABAMA POWER COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ATLANTIC CITY ELECTRIC COMPANY, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE UNITED STATES,
THE INTERSTATE COMMERCE COMMISSION
AND THE SECRETARY OF AGRICULTURE

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1283

ALABAMA POWER COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 1083

ATLANTIC CITY ELECTRIC COMPANY, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION AND THE SECRETARY OF AGRICULTURE

These are appeals from judgments of three-judge district courts convened pursuant to 28 U.S.C. 1336

and 2325, dismissing for lack of jurisdiction complaints against a general rate increase order of the Interstate Commerce Commission. We submit this joint memorandum on behalf of appellees the United States, the Commission and the Secretary of Agriculture (a party only in No. 1283).

STATEMENT

For many years, the nation's railroads have reacted to increases in costs and corresponding declines in their earnings by requesting the Commission from time to time to authorize general, across-the-board increases in their freight rates—generally by a stated percentage.[1] The Commission responds to such a request by holding an investigation in which the principal issue is whether the railroads' costs and revenue needs justify permitting the proposed rate increases to go into effect.[2] Thus, in the proceedings

[1] Instead of simply publishing new rates subject to possible investigation and suspension by the Commission, as the law on its face permits, the railroads affirmatively seek Commission approval for two reasons: to obtain modification of outstanding Commission-prescribed rates on various of the commodities carried; and to get relief from inadvertent violations of the long-short haul provisions of Section 4 of the Act, 49 U.S.C. 4. When the Commission gives its approval to a general rate increase, it clearly states, as it did in this case, 332 I.C.C. 714, 715, 792, that it is neither prescribing rates nor passing on the lawfulness of any particular rate. See *Arizona Grocery Co.* v. *Atchison T. & S.F. Ry. Co.*, 284 U.S. 370.

[2] Under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), the Commission may investigate a proposed tariff with or without suspension.

involved in these cases, the Commission, after investigating the general increases proposed by the Class I railroads on March 11, 1968, concluded in an interim report issued on November 25, 1968, that the railroads had a critical need for additional revenue, without which they would be unable to continue to provide adequate service; its final report of January 9, 1969, incorporated this conclusion and in addition approved in a general way, with some modifications, the proposed allocation of the increases thus found necessary among various commodities.[3]

A group of shippers commenced the *Alabama Power* case (here in No. 1283) in the District Court for the District of Columbia as a class action seeking to set aside the Commission's findings as to the railroads' costs and revenue needs. Under the authority granted him by 7 U.S.C. 1291(b) and 28 U.S.C. 2323, the Secretary of Agriculture intervened as a plaintiff to assert the interests of agricultural shippers. The Class I railroads intervened as defendants, claiming that the district court had no jurisdiction to review the Commission's orders; the Commission made no objection to judicial review and defended its order on the merits; and the United States, a statutory defendant, took a neutral position. With Circuit Judge

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[3] The Commission's interim order is published at 332 I.C.C. 590, and its final order is published at 332 I.C.C. 714; they are set forth as J.S. (No. 1283) Apps. B and C. The unreported opinion of the court in *Alabama Power* is set forth as J.S. (No. 1283) App. A. The opinion of the court in *Atlantic City Electric* is reported at 306 F. Supp. 338, and is set forth in J. S. (No. 1083) App. 1a-14a.

Wright dissenting, the three-judge district court held, on the authority of *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.), that a general rate increase order was not directly and immediately reviewable. It held that plaintiffs' recourse was rather to go before the Commission with challenges to particular rates under Sections 13 and 15 of the Interstate Commerce Act, 49 U.S.C. 13, 15, and to seek judicial review, if necessary, of the Commission's resulting decisions.

In the meanwhile, the *Atlantic City Electric* case (here in No. 1083) had been begun in the District Court for the Southern District of New York by a group of users of bituminous steam coal. Several state agencies intervened as plaintiffs asserting their concern with increases in rates for grain and feed, and again the Class I railroads intervened and asserted lack of jurisdiction, while the United States took a neutral position.[4] The Commission, reading the complaints of the appellant coal users and the other plaintiffs as being concerned only with the increased rates on particular commodities, argued that their claims—unlike the more general claims asserted in *Alabama Power*—were not subject to direct review under a proper reading of the doctrine established in *Algoma, supra.* The district court agreed that the plaintiffs' claims were presently unreviewable, stating that while the plaintiffs attacked the procedures followed in the general revenue proceeding, their real

[4] The Secretary of Agriculture is not a party in No. 1083, and was not below.

grievance was with the higher rates on the particular commodities of interest to them; these grievances, it held, were required to be asserted in proceedings under Section 13.[5]

DISCUSSION

Algoma Coal & Coke Co. v. *United States*, *supra*, and the three-judge court cases following it[6] have established that a shipper can attack in court particular rates increased under a general rate order only after filing a complaint with the Commission pursuant to Sections 13 and 15 of the Act challenging those rates as not just and reasonable. Thus, shippers cannot sue with "[t]he object * * * to enjoin putting [particular] increased rates into effect," 11 F. Supp. at 491, but rather must exhaust the statutory procedures for contesting the reasonableness of particular rates even though they have been raised as a result of a Commission-authorized general rate increase.

The suit in *Alabama Power*, in contrast, challenges not the lawfulness of particular rates but the Com-

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[5] In a recent case decided by a different statutory three-judge panel of the District Court for the District of Columbia, the same result was reached. Plaintiff attacked the same order here in question, but only as it authorized increased rates on radio and television sets and electronic components. *Electronics Industries Association* v. *United States*, D. D. C. Civil No. 1059-69, decided April 2, 1970. Time for noting an appeal has not expired in that case.

[6] *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla.) affirmed *per curiam*, 352 U.S. 1021; *Koppers Company, Inc.* v. *United States*, 132 F. Supp. 159 (W.D. Pa.).

mission's general findings as to the railroads' need for additional revenue as justification for a proposed across-the-board rate increase. Accordingly, taking into account the trend of this Court's recent decisions in favor of reviewability, see, *e.g.*, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, as well as the obvious causal relationship between the Commission's action and increased charges to shippers, the Commission concluded that *Algoma* did not apply in this situation, and in the court below it defended its order and findings on the merits. The United States and the Secretary of Agriculture agree with the Commission that the complaint in *Alabama Power*—alleging that substantial evidence did not support the Commission's conclusion that a general rate increase is warranted—states a claim warranting direct judicial review.

The question whether immediate review can be had of the Commission's general findings in support of an across-the-board rate increase is a question with important practical significance for both shippers and the railroads. Of substantial public concern would be the enormous cost to the nation's shippers of higher rates collected while the general issues are considered piecemeal in Section 13 proceedings. There is thus considerable practical logic in Judge Wright's dissenting observation in *Alabama Power* that the Commission's findings respecting the carrier's general revenue needs should be reviewable directly and immediately. Indeed if a challenge to such findings is improper in a Section 13 proceeding, as the Commission once appears to have ruled,[7] then, under the decision below, the cost and revenue findings which are

the foundation of a general rate increase order could not be reviewed at all.[8]

On the other hand, serious problems would be presented to the railroads, particularly those in precarious financial condition, if across-the-board interlocutory relief were given against rate increases as an incident of reviewability. A temporary restraining order or preliminary injunction staying a Commission general revenue order ultimately held valid could result in the loss of large amounts of urgently needed rail revenues.[9] Thus, an approach to judicial review that contemplated such interim relief would raise serious questions.

Therefore, we agree with the appellants that the availability of judicial review of the claims as-

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[7] The Commission appears to have taken this position in 1958 in *Koppers Co., Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 387.

[8] The court below in *Alabama Power* did not decide or discuss whether the Commission's findings on costs and revenue needs in a general rate proceeding could be challenged by a shipper in a Section 13 proceeding before the Commission. The court in *Atlantic City Electric*, held that such a challenge would be proper in a Section 13 proceeding.

[9] In the present case, the railroads estimated before the Commission that their proposed rate increase would produce increased revenue of $466.2 million—some $89.2 million short of annual revenue needed simply to cover their increased expenses. 332 I.C.C. at 602. The total income of the Class I railroads in 1968 was $542.2 million and their rate of return on net investment was estimated to be 2.58 percent. 332 I.C.C. 612. Thus each month of delay in a rate increase would be very costly, with perhaps as much as $40 million per month in revenue lost.

serted in *Alabama Power* (No. 1283) is an important question that deserves plenary consideration by this Court. The *Atlantic City Electric* case (No. 1083, in which the Secretary of Agriculture is not a party) presents, however, a special problem, being poised somewhat uncertainly between *Algoma* and *Alabama Power*. As noted, the Commission argued non-reviewability below in this case, reading the complaints as attacks on particular rates rather than on the general aspects of the Commission's order, and the district court seems to have agreed. If this view of the case is proper, the decision below was correct under the *Algoma* doctrine, but if the issues raised in the district court should be viewed more broadly, then the *Atlantic City Electric* case should be treated on the same basis as *Alabama Power*. Consistent with its position below, the Commission believes that *Atlantic City Electric* involves only an attack on particular rates, and accordingly that the decision below should be affirmed summarily. The United States takes the view that this subsidiary question cannot appropriately be resolved at this stage of the case and therefore that the Court should give plenary consideration to No. 1083 as well as No. 1283.[10]

[10] We agree with the appellants that this Court has jurisdiction of both appeals under 28 U.S.C. 1253. *E.g., City of Chicago* v. *United States*, 396 U.S. 162.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted in No. 1283. As to No. 1083, the Interstate Commerce Commission believes that the judgment of the district court should be affirmed and the United States believes that probable jurisdiction should be noted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

ATLANTIC CITY ELECTRIC COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ALABAMA POWER COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL. TO AFFIRM

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May 1970

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MOTION OF ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL. TO AFFIRM

The Aberdeen and Rockfish Railroad Company, et al., appellees, respectfully move, pursuant to Rule 16(1)(c) of the Rules of this Court, that the judgments of the district courts in these cases be affirmed on the ground that the questions presented are so lacking in substance as not to warrant further briefing or oral argument.

STATEMENT

Between 1960 and 1967 there was no general increase in railroad freight rates. In the latter part of the period, however, wage and material prices began to rise steeply, and in 1967 the railroads found it necessary to make a general rate increase. In 1968 the Interstate Commerce Commission permitted this increase to go into effect. *Increased Freight Rates, 1967*, 332 I.C.C. 320 (1968) (Ex Parte No. 256). Even as the Commission proceeding in Ex Parte No. 256 was in progress, however, it was apparent that inflationary pressures were such that a further increase was necessary.

In March 1968 the railroads began the process of making further increases in their rates and in certain charges for special services. The railroads initiated proceedings before the Commission, known as Ex Parte No. 259, by filing a petition that principally sought relief from the regulations of the Commission, promulgated pursuant to Section 6 of the Interstate Commerce Act, prescribing the form of railroad tariff publications. As a general rule, rates are made by carriers simply by filing tariffs or tariff amendments. However, when an increase affecting every rate of every railroad is to be made, it is impracticable to comply with all technical tariff publication rules. The petition also requested modification, to the extent necessary to allow the increase, of outstanding Commission orders prescribing rate levels or maximum rates and relief, to the extent necessary, from the long-and-short-haul provision of Section 4 of the Act.

The ministerial relief from the tariff-publication rules was granted, and on March 11 a tariff was filed in-

creasing railroad freight rates generally by amounts varying by commodity and ranging from 3 to 10 percent. The Commission established an expeditious procedure, involving the submission of affidavits and written arguments for and against the increase and the hearing of oral argument. The expressions of views thus invited were designed to assist the Commission to determine how it should proceed further.

Shortly before the tariff containing the increases in rates and charges was to become effective the Commission, in the exercise of its power under Section 15(7) of the Act, suspended effectiveness of the tariff to the extent that rate increases exceeded 3 percent and instituted an investigation of the lawfulness of the increased rates. Hearings in the investigation were held between September 9 and October 8, 1968, and briefs were filed with the Commission.

On November 25, 1968, the Commission issued a report and order vacating its suspension of the rate increases except on a few commodities. 332 I.C.C. 590. On January 23, 1969, the Commission concluded the investigation by issuing its final report and order. It adopted the findings of its November 25 report, which included a finding that the railroad industry's return on investment in 1968 was 2.58 percent, characterized as "clearly inadequate," *id.* at 603, and, with a few exceptions, permitted the increased rates and charges to become effective. 332 I.C.C. 714. In the final order the Commission found, as it had previously, that the railroads had "a critical need" for additional revenues to offset, in part, increased operating costs. *Id.* at 790. It also found that the public interest and the national defense interest "in a sound, adequate, and efficient transportation system

will be adversely affected unless the proposed increased interstate freight rates and charges . . . are permitted to be continued or to be put into effect." *Ibid.*

The Commission further found that overall "the increased freight rates and charges authorized herein will not exceed a maximum reasonable level," and that the increases would "have no undue adverse effect on the movement of traffic by railway." *Id.* at 792. The Commission made clear, however, that its "findings as to justness and reasonableness . . . will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction." Specifically, the Commission said that the increased rates were not to be "considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370," and would, "in all respects, be subject to complaint and investigation as provided by the act." *Ibid.* The order of suspension was vacated and the investigation proceeding was ordered discontinued. *Id.* at 793. The orders thus preserved fully the right of shippers to complain against and have the Commission pass upon the justness and reasonableness of any particular rates by which they might be affected.

In the two cases below shippers of coal, grain, chemicals and other commodities sought to have the Commission's orders set aside. These appellees, the Class I railroads of the United States, intervened. In both cases three-judge district courts, one in the District of Columbia and the other in the Southern District of New York, held that the Commission's general revenue orders, which did not determine the lawfulness of any

increased rate, could not be reviewed until after the appellants exhausted their administrative remedies by obtaining the Commission's determination of the lawfulness of particular rates by which they were affected. The courts' decisions followed precedent that dates back to 1935 and has been reaffirmed as recently as last month.

ARGUMENT

The issue here is not whether a shipper can have review of an Interstate Commerce Commission order approving or prescribing a rate for the carriage of freight that the shipper considers unreasonable. There is no doubt that such review is available. The issue is whether judicial proceedings can be instituted before such an order is entered, at a time when the Commission has merely found in a preliminary way that an overall increase in rates is not unreasonably large, but not that any particular rate as so increased is necessarily lawful.

The issue has long been regarded as settled and settled against the kind of premature judicial review attempted here: the Commission's general revenue orders, permitting railroads to increase their freight rates, are not reviewable at the instance of shippers who have not exhausted their administrative remedies with respect to the rates affecting them. A three-judge district court first so held in 1935, *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935), and that holding has been repeated in subsequent decisions, most lately last month. The rule of those decisions is a recognition of the unique nature of the Commission's general revenue proceedings. It has not been affected by the abrogation of the negative

order doctrine, *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125 (1939), or the enactment of the Administrative Procedure Act, liberalizing reviewability.

The decision of this Court in *City of Chicago* v. *United States*, 396 U.S. 162 (1969), emphasized by the appellants, does not justify overturning the rule that has been applied by the courts for 35 years. In that case the Court held that an ICC order is not unreviewable merely because it is permissive. The position of these appellees is not that the orders of the Commission here involved are unreviewable merely because they are permissive but rather that because the orders do not determine the lawfulness of particular rates a shipper may properly be remitted to a complaint proceeding under Section 13 of the Interstate Commerce Act to test the lawfulness of any rate under which his goods are moved instead of being permitted to make an abstract judicial challenge to a general revenue order. The critical distinction between the cases is that those objecting to the discontinuance of trains in the *City of Chicago* case had no remaining administrative remedy after the Commission terminated the proceeding; the shippers here have a wholly adequate remedy.

In a Section 13 proceeding a shipper would have the opportunity to raise and to preserve for judicial review any objection he might have to the general level of rates, the substantive findings that moved the Commission not to disapprove an increase to that level and the procedure that led to the order embodying those findings if such findings bore on his claim that the rate he was attacking was unlawful. In short, by prosecuting a complaint against a rate he considers unjust or unreasonable a shipper can obtain reparations

for past overcharges and relief for the future if the rate is unjust or unreasonable. The railroads, on the other hand, would have no way of recouping the loss of revenue they would suffer if, as an incident to a suit to set aside one of the Commission's general revenue orders, they were precluded from collecting the increased rates *pendente lite* and those rates were ultimately found to be reasonable.

The cases now before the Court are peculiarly inappropriate vehicles for re-examining the long-standing rule requiring exhaustion of remedies because the questions raised by the appellants concerning the merits of the Commission's general revenue proceeding and orders are unsubstantial.

I

For many years the Commission from time to time has conducted what have come to be called general revenue proceedings.[1] These proceedings are quite different from the typical Commission rate case, brought by complaint under Section 13 or by petition under Section 15(7) of the Interstate Commerce Act against one rate or a limited group of rates. In such a case any aspect of the legality of a rate may be in issue—its justness and reasonableness, whether it is unjustly discriminatory or unduly preferential or prejudicial or any other element of the lawfulness of a rate. Upon the record made, which is focused on the rate or rates at issue, the Commission, if it finds the rate published or proposed by the carrier unlawful, may order the rate canceled, make findings that

[1] The early cases are described in 3B Sharfman, The Interstate Commerce Commission 33-221 (1936).

lay the basis for claims of reparations for the past and prescribe or define the allowable level of future rates. Or if the Commission does not find the carrier's rate unlawful, it may simply terminate the proceeding. An order in such a case, whether it results in cancelation of a rate or simply in discontinuance of the proceeding, is of course reviewable in court. See *City of Chicago* v. *United States*, 396 U.S. 162, 166 n. 5 (1969).

A general revenue proceeding, on the other hand, does not definitely determine the lawfulness of any rate but rather amounts to a preliminary scrutiny of carrier-initiated increases of a broad range of rates. In the case with which we are concerned here, the range was the broadest possible, all freight rates in the country. In the period of generally rising prices the nation has experienced since the Commission obtained effective rate regulation power the usual general revenue proceeding has been prompted by what rail carriers throughout the country or in a rate territory have thought to be their immediate need for increased revenues to maintain themselves as an effective agency of transportation in the public interest. The issues are as described in Section 15a(2) of the Act, where the Commission is directed to consider the "need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and . . . the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service"; and also the effect on the movement of traffic of the rates under consideration.

What the Commission does, having received information and arguments calculated to illuminate the

question, is to make an informed judgment whether in the overall aggregate, or as applied to very broad categories of commodities, the rate increase proposed or published by the carriers will do more than merely satisfy the carriers' "need of revenues" to enable them to maintain adequate and efficient service and whether on some or all commodities the carriers may be pricing themselves out of the market. The Commission cannot practically and does not attempt to focus on particular rates and determine their lawfulness, even under the statutory standard of justness and reasonableness. It merely determines, in a preliminary way, whether it appears that the rate increases are justified within the policy of Section 15a(2) or whether, on the other hand, they are unreasonable and will yield excessive revenues for the carriers. This Court has recognized the practical necessities that compel the Commission to proceed as it does in general revenue cases. In *United States* v. *Louisiana*, 290 U.S. 70, 76-77 (1933), the Court said that

> "in performing the duty broadly to increase carrier revenue, it is enough if the Commission, in the first instance, makes such inquiry and investigation as would enable it to say that the prescribed increases when applied to members of the group will generally not exceed a reasonable maximum. The extent of this inquiry and the detail of investigation can not be marked by this Court with certainty. The size of the group dealt with, the nature of the traffic, the urgency of the relief demanded, these and other factors should condition the Commission's procedure in each case."

See also *New England Divisions Case*, 261 U.S. 184, 197-98 (1923).

The Commission in fact has used various forms of procedures in general revenue cases. There is almost

always a pressure of time, particularly so in a highly inflationary period like the present; if Commission proceedings run into several months—and even expeditious Commission proceedings may do so—continuing inflation will erode the expected benefits of any rate increase. In the proceeding that appellants attempt to bring here the Commission, as we have related, first granted the carriers permission to publish their rate increases in a form not specified in its tariff regulations and then suspended the rates to the extent that the increase exceeded 3 percent and subjected them to an evidentiary investigation. Sometimes the Commission has received data and heard arguments before deciding whether to exercise its power to suspend the effectiveness of a tariff. That was the procedure the Commission followed when the carriers published a rate increase subsequent to the increase appellants question here. *Increased Freight Rates, 1969*, ICC Order of Nov. 17, 1969 (Ex Parte No. 262). It was also the procedure followed by the Commission in the first of the cases in which a court held that a Commission order permitting carrier-initiated general rate increases to go into effect was not reviewable until administrative remedies had been exhausted.

The case is *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935). That case is in many respects strikingly similar to this one. There, as in this case, the Commission had permitted railroads to put into effect selective increases in rates "to meet in part increased expenses of operation caused by an increased wage scale and rising cost of materials and supplies." 11 F. Supp. at 489. The Commission permitted the carriers to make certain rate increases, though not precisely those they had proposed. The

Commission made findings very much like those it made in the present case. It concluded that the rates permitted would not be in excess of just and reasonable rates and noted that the increased rates would be subject to complaint proceedings as provided by the Act and that reparations would be available if the rates ultimately were found to be unreasonable.[2] It entered orders granting special tariff-filing permission and relief under Section 4 and modifying existing rate orders.[3] 11 F. Supp. at 489-91.

A group of coal shippers brought suit to have the Commission's orders set aside. The three-judge court dismissed the complaint, reasoning that it would be

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[2] That is the purport of the Commission's statement below that "the increased freight rates and charges authorized herein are not considered as prescribed within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 380 . . . ." 332 I.C.C. at 792. If the Commission has prescribed a rate there can be no reparations for the period it was in effect, but if a carrier-initiated rate is found unjust or unreasonable there can be reparations. Sections 8 and 16 of the Act deal with reparations.

[3] The appellants in No. 1283 attempt to found reviewability on the § 4 relief and rate-order modification actions of the Commission here (Jur. St., No. 1283, p. 8). None of the appellants in the courts below attacked the Commission's order for the rate prescription and § 4 relief they granted. The issue whether those determinations are now reviewable is therefore not presented by the appeals. Further, if it were sought to make an attack upon the Commission's orders in this respect, the answer given by the three-judge court in the *Algoma* case is applicable. The court said that the two orders, modifying existing rate prescription orders and granting § 4 relief, "are of themselves purely incidental to the main purpose of the proceeding before the Commission. Furthermore, it is to be noted that it is not clearly shown by the plaintiffs that they suffer any injury by virtue of these particular orders, which were merely a means to an end." 11 F. Supp. at 492-93. Here the appellants have not even alleged injury as a result of these orders, much less shown it.

open to any shipper to complain to the Commission about any particular rate and to have a full adjudication of the legality thereof.[4] See also *Birmingham Slag Co.* v. *United States*, 11 F. Supp. 486 (N.D. Ala. 1935), dismissing a complaint directed to the same order that was involved in the *Algoma* case.

The *Algoma* decision has been followed in two other three-judge court cases prior to the current litigation relating to Ex Parte No. 259. These cases were decided after this Court's decision in *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125 (1939), and after what is now 5 U.S.C. §§ 701, 702, 704, 706 (Section 10 of the Administrative Procedure Act), liberalizing judicial review, was enacted in 1947. Thus they cannot be explained as resting on some outmoded, restrictive view of the availability of judicial review. In one case the decision was affirmed on the jurisdictional papers by this Court. The cases are *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955), and *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd per curiam*, 352 U.S. 1021

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[4] The court also noted that the principal action of the Commission was, as noted in the text above, to decline to suspend a carrier tariff. Of course, it is perfectly clear that such action of the Commission is not reviewable on any view of the law. See Long Island R.R. v. United States, 193 F. Supp. 795, 797-98 (S.D.N.Y. 1961); compare Arrow Transp. Co. v. United States, 372 U.S. 658 (1963). The appellants seek to capitalize on this distinction of the *Algoma* case from the present case. But in fact what the Commission did here is altogether like making a decision not to suspend. It made a preliminary determination that the published increases are not unreasonable, leaving any party who considers himself aggrieved the fully adequate remedy of a § 13 complaint, just as any such party is remitted to that remedy when the Commission declines to suspend a tariff and enter upon an investigation of the lawfulness of a rate. The difference in form of the two proceedings should not result in an order in one being reviewable and an order in the other not reviewable.

(1956). The court in the *Koppers* case, which involved another general revenue increase order, stated the rationale of this line of cases as well as it has been expressed.

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and knowhow —in a proceeding wherein an unequivocal compliance with Sections 13 and 15 has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits."

Lately, in addition to the decisions below, a differently constituted three-judge court in the District of Columbia has followed *Algoma* in dismissing a complaint against the same order in Ex Parte No. 259, *Electronics Industries Ass'n* v. *United States*, D.D.C. Civil Action 1059-69, decided April 2, 1970. This means that in the last 35 years seven panels of district and circuit judges have held that general revenue increase decisions of the Commission cannot be reviewed until the Commission's processes for determining the lawfulness of rates have been fully pursued. Twenty judges have concurred in that holding, and only one has dissented. This Court summarily affirmed the one district-court judgment that until now has been brought to it.

II

The appellants rely upon the recent decision of this Court in *City of Chicago* v. *United States*, 396 U.S. 162 (1969). The appellants in No. 1083 go so far

as to urge that the unbroken line of decisions to which we have referred be disapproved and the judgments below reversed summarily merely on the basis of the *City of Chicago* case. (Jur. St., No. 1083, pp. 9-14).

The *City of Chicago* case does not cast any doubt on the decisions below, much less call for summary reversal.

In that case the Commission, pursuant to Section 13a(1) of the Act, conducted an investigation to determine whether certain railroads could discontinue certain passenger trains. The Commission determined that continued operation of the trains was not required by the public convenience and necessity and that such continued operation would unduly burden interstate commerce, the tests under Section 13a(1). The Commission then entered an order terminating its investigation. The district court dismissed a complaint against the Commission order on a theory that this court quite correctly described as "of the vintage we discarded in" *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125 (1939). The theory was that, because the trains could be discontinued unless the Commission ordered to the contrary, only an order requiring continuance was reviewable. This Court reversed unanimously.

The position of these appellees in these cases, however, is not that the Commission's order is unreviewable because it is permissive or negative in form. One does not need the *City of Chicago* decision to know that such a position is not tenable today. The position of the railroads, rather, is that in the circumstances of a general revenue proceeding, which set it off from any other Commission proceeding, review of a Commission decision permitting a rate increase should not be had

on the complaint of a shipper until that shipper has pursued the thoroughly adequate statutory remedy provided with respect to any rate by which he is actually affected. The persons objecting to the discontinuance of the trains in the *City of Chicago* case, on the other hand, had no further administrative remedy after the Commission's discontinuance proceeding was terminated.

The effectiveness of the shipper's Section 13 complaint remedy is not at all dependent on his having review of the general revenue order. In short, the basis of the *Algoma* line of decisions is that there is no need to review an order of the Commission entered in a general revenue proceeding, which is based on quite preliminary and general findings and which determines the lawfulness of no rate or group of rates. There is no need for such review because the statute gives a shipper an efficacious remedy whereby he can obtain a Commission determination, which will be subject to judicial review, of the lawfulness of the particular rate or rates on which his commodity moves. This remedy protects the shipper against the only consequence of the Commission's general revenue order that has any direct and substantial effect upon his legal interests.

III

The appellants contend that the remedy of a Section 13 complaint proceeding is inadequate. That contention is a major part of the foundation for their argument that they are now entitled to review of the Commission's orders in the general revenue proceeding. For the most part the contention is buttressed by nothing more than rhetorical assertion, *e.g.*, "to require the plaintiffs to proceed before the Commis-

sion pursuant to Section 13 amounts to denying them any effective relief." (Jur. St., No. 1083, p. 12). Such substantiation as the appellants attempt relates mainly to their fear that the Commission's general revenue orders and the findings underlying them would be conclusive of issues that they might attempt to raise concerning rates that affect them in Section 13 proceedings. There is no warrant for any such fear since it is patent that in a Section 13 proceeding anything relevant to the lawfulness of the rate at issue may be shown.

The Commission has never held that inquiry into the extent of carrier revenue need or anything else decided in a general revenue case was barred in a Section 13 case. The same criteria of Section 15a(2) are the guides to decision concerning reasonableness of rates both in a general revenue case and a complaint case so that such a holding would be impossible to square with the Commission's governing statute. There is a passage in *Koppers Co.* v. *Chesapeake & O. Ry.*, 303 I.C.C. 383, 387 (1958), that is quoted by appellants as if it were such a holding. (Jur. Sts., No. 1083, p. 16; No. 1283, p. 11). The passage is murky, but nothing in the Commission's language indicates that the shipper-complainant was precluded by the general revenue order from showing that the assailed rates for his traffic were unlawful. Certainly there are cases in which the Commission, considering one rate or a limited number of rates, has looked to costs and revenue need, which is the central issue in any general revenue proceeding.[5]

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[5] *E.g.*, Baltimore & O.R.R. v. Chicago & E.I.R.R., 318 I.C.C. 771, 776-77 (1963), *rev'd on reconsideration*, 322 I.C.C. 572, 576-77 (1964); Rochester & Pittsburgh Coal Co. v. Baltimore & O.R.R., 294 I.C.C. 423, 433-34 (1955); Avera Packing Co. v. Atlantic Coast Line R.R., 296 I.C.C. 17, 19-20 (1955).

In any event, there is no reason to doubt that, if in a Section 13 case the Commission were to rely upon a general revenue order or the revenue need findings therein, a shipper would be able to assert that the order, the findings or the proceedings leading to the order were flawed in any of the ways the appellants allege. The question for the Commission would be whether there was indeed any such error as was claimed, and whether the error vitiated the proceeding.

On review of a Commission order in a Section 13 case ruling against a shipper's claims of error in a general revenue increase order and relying upon the order, there would be two possibilities. One is review of the Commission's decision as to the errors claimed, which would be according to traditional standards of judicial review. The other possibility is that a court would hold that the Commission could not rely at all upon the unreviewable general revenue order when carrier revenue needs were brought in question as a part of a subsequent Section 13 rate case, even in the absence of any substantiated claim of prejudicial error in the proceedings leading to that order.

The district court in No. 1083 stated what we regard as the correct rule:

> "We see no reason why, upon making a proper record before the Commission in a Section 13 proceeding, plaintiffs cannot preserve the objections which they now assert to the procedure leading up to the general revenue order. We believe that an adverse ruling of the Commission on these objections should be reviewable by a court upon its review of the Commission's final order in the Section 13 proceeding." (Jur. St., No. 1083, p. 13a).

Thus, ultimately the general revenue order and findings cannot bar a shipper from raising in litigation over any rate by which it is affected any issue relevant to the reasonableness of the rate. If the shipper prevailed and the rate were found unreasonable, it would be canceled and a reasonable rate substituted for the future. Further, the shipper would have a basis for claiming reparations for the period in which it was made to pay the unreasonable rate in the past. That is the extent of any shipper's legitimate interest.

By contrast, the railroads would have no recourse if, in connection with a Court review of a general revenue order, they were prohibited from collecting rates ultimately found reasonable in the review proceeding after months or years had passed. While there is doubt that a court has power to enter an interlocutory order of that sort, *cf. Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), the practices of the district courts have not been uniform, and suits to set aside Commission orders can be brought in many courts throughout the country. For this reason and because of the magnitude of what is at stake, the concern of the railroads about the possibility of interlocutory relief is a very real concern. No judicial remedy is available to them by which they can order the upward spiral of wages and material costs halted. The proceedings before the Commission necessarily consume some time after the carriers determine that a rate increase is needed to provide them with the revenues necessary to maintain adequate service in the public interest. Necessarily the revenues forgone during the period of Commission deliberation cannot be recaptured. No more could revenues forgone as a result of a *pendente lite* judicial order entered in a pro-

ceeding to review a general revenue order. And meanwhile the inflationary spiral continues, rendering inadequate for the future the rate increase not realized in the past.

IV

There is no substance to appellants' claims of error in the Commission's orders or the proceedings leading to them. If the Court were to note probable jurisdiction these appellees would urge as an alternative ground for affirming the district courts' judgments that the Commission's order should be sustained on its merits and the complaints dismissed for that reason. Some of the claims are trivial, such as the complaint that the Commission's staff did not participate in the proceeding. (Jur. St., No. 1083, pp. 4, 22). Others are plainly extravagant, such as the claim of the appellants in No. 1083 that the Commission's findings concerning justness and reasonableness had no evidentiary support. (*Id.*, pp. 4, 21). None has any merit. We shall not argue the point now beyond the following comments:

For the conduct of Ex Parte No. 259 the Commission established procedures that were designed to give it the benefit of all the data and arguments pertinent to the preliminary, general findings appropriate to a general revenue proceeding. Hearing examiners took evidence on behalf of the Commission, which received briefs from the parties. It issued two long reports and orders, the first vacating its previously ordered suspension (which itself followed the receipt of written data and legal contentions and oral argument) and a subsequent, more complete report, approving most of the increases sought and formallly granting the needed modification of outstanding orders.

The Commission made findings concerning the carriers' revenue needs and other issues in the proceeding as definitive and detailed as the preliminary nature of the proceeding required. Some of its findings we have quoted or paraphrased in our statement of the case. Those findings and the others made by the Commission, all based on substantial evidence, led inevitably to the conclusion that the rate increases the Commission allowed would not result, overall, in rates that exceeded the standard of justness and reasonableness. So far as revenue needs were concerned, the Commission, while noting the railroads' dismal rate of return, found that the increases were needed just to help the carriers to meet their operating costs and would only partially offset increases in such costs. (P. 3, *supra*). In these circumstances there is no conceivable merit to the major contention of the appellants in No. 1283, that the Commission should have made detailed findings concerning the amount of the carriers' financial needs, their investment requirements and the like. (Jur. St., No. 1283, p. 5 & n.1). *Cf. Chicago & North Western Ry.* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 326, 343-48 (1967).

CONCLUSION

The judgments of the district courts should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted], 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants

—*v.*—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR ATLANTIC CITY ELECTRIC CO., ET AL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1083

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees

REPLY MEMORANDUM FOR ATLANTIC CITY ELECTRIC CO., ET AL.

The memorandum for the United States, the Interstate Commerce Commission (hereinafter "ICC") and Secretary of Agriculture in Nos. 1283 and 1083 indicates a division between the United States and the Interstate Commerce Commission as to whether probable jurisdiction should be noted in No. 1083, *Atlantic City Electric Co. et al.* v. *U. S. et al.* The United States believes that probable jurisdiction should be noted in *Atlantic City*, while the ICC urges that probable jurisdiction be noted in *Alabama Power Co. et al.* v. *U. S. et al.* only.

The ICC, in supporting review in No. 1283 and opposing it in No. 1083, misconceives the nature of the issue before this Court, and does not recognize that the distinction between the position of these Appellants and Appellants in No. 1283 is not significant for the purpose of determining that issue.

Both *Alabama Power* and *Atlantic City Electric* are appeals from three-judge district court decisions denying plaintiff shippers the right to obtain judicial review of an ICC order and the procedures followed by the ICC in arriving at such order. It is true, of course, as the memorandum of the ICC notes, that in *Atlantic City Electric* the Appellants' "real grievance was with the higher returns on the particular commodities of interest to them" (pp. 4-5). However, the ICC is wrong, and in fact naive, in assuming that the "real grievance" of the Appellants in *Alabama Power* is any different. Both Appellants allege that the rate increases approved by the Commission are unlawful; both Appellants seek reversal of the ICC's order on the grounds that it lacks the required evidentiary support.

The cases differ because, in seeking review, Atlantic City and Alabama Power rely on different errors of the Commission.

Alabama Power, as correctly noted in the memorandum for the United States and the ICC, basically urges that there was insufficient evidence for the Commission to find that the railroads needed additional revenues.

Atlantic City Electric urges that the Commission erred in accepting the railroads' allocation of such revenue increments among shippers, even assuming, *arguendo*, that revenue needs existed, because:

(a) the railroads failed to meet their statutory burden of proof that resulting rates and charges to individual shippers would be just and reasonable;

(b) the railroads failed to bear their statutory burden of proof that the resulting rates would not cause a diminution of net revenues due to diversion of traffic from the railroads; and most importantly,

(c) regardless of the weight of evidence in the record, the Commission's order should be set aside because the

Commission erred by failing in its duty of affirmative regulation, taking no part in the proceedings except as an umpire, blandly calling balls and strikes between necessarily unequally matched litigants.

However, at this time the differences in the errors urged below are not significant: both courts below denied review of the Commission's order, basing their decisions solely on the *Algoma** doctrine, which the Appellants in No. 1083 and in No. 1283, together with Judge Skelly Wright in his dissent in *Alabama Power*, believe to be inapplicable.

The issue here is whether shippers may obtain judicial review of ICC orders of the type here complained of, namely, nationwide, across-the-board freight rate increases. Should this Court agree to decide that narrow issue, which we believe it should, it also can then decide whether the pleadings below properly raised such issue.

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* *Algoma Coal & Coke Co.* v. *U. S.*, 11 F. Supp. 487 (E.D.Va., 1935).

Certificate of Service

I, SHEILA H. MARSHALL, as attorney for Atlantic City Electric Company, et al., Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 7th day of May, 1970, I served copies of the foregoing Reply Memorandum on the following, all of whom were parties to the action in the court below, by first class mail, postage prepaid.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1283

ALABAMA POWER COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Columbia

---

REPLY TO MOTION OF ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL. TO AFFIRM

Appellees Aberdeen and Rockfish Railroad Company et al. (Railroads) have filed a single motion to dismiss in this case and in Docket No. 1083, *Atlantic City Electric Company et al.* v. *United States of America et al.* The United States, the Interstate Commerce Commission (Commission) and the Secretary of Agriculture (Secretary) have filed a joint Memorandum in both

cases in which they concede that No. 1283 was wrongly decided by the Court below, stating:

> "... the complaint in *Alabama Power* ... states a claim warranting direct judicial review." (p. 6)

The Railroads claim that the case is not ripe for judicial review on the theory that Appellants had available an alternative remedy before the Commission by filing a complaint under Section 13 of the Interstate Commerce Act.[1] The United States and the Commission disagree. They concede that no such remedy is available (Memorandum pp. 6-7).

The Railroads' motion suggests that the Commission's decision in *Ex Parte 259* was a tentative ruling subject to being affirmed or reversed upon more mature consideration in some later proceeding. No less than seven times is it characterized as "preliminary":

> "... The Commission has merely found in a *preliminary*[2] way that an overall increase in rates is not unreasonably large ..." (p. 5)
>
> "A general revenue proceeding ... amounts to a *preliminary* scrutiny of carrier-initiated increases ..." (p. 8)
>
> "It merely determines, in a *preliminary* way, whether it appears that the rate increases are justified ..." (p.)
>
> "It made a *preliminary* determination that the published increases are not unreasonable ..." (p. 12)

---

[1] The Railroads have abandoned the contention, on which they placed major reliance in the Court below, that the Commission's order is unreviewable because permissive. They now concede that "One does not need the *City of Chicago* decision to know that such a position is not tenable today" (p. 14).

[2] Emphasis supplied unless otherwise noted.

". . . an order of the Commission based on quite *preliminary* and general findings" (p. 15)

". . . the data and arguments pertinent to the *preliminary*, general findings . . ." (p. 19)

"The Commission made findings . . . the *preliminary nature of the proceeding required.*" (p. 20)

Preliminary to what? The proposed increased rates were allowed to become effective and, just as in *City of Chicago* v. *United States*, 396 U.S. 162, the investigation was discontinued by the Commission. The increased rates are being collected by the carriers and paid by the shippers. No action has been taken subsequent to discontinuance of the proceeding and, to our knowledge, none is contemplated by the Commission unless required by the Court. "Preliminary" is a curious way to characterize action which authorizes substantial increases in freight rates, finds that "The increased freight rates and charges authorized herein will not exceed a maximum reasonable level . . .", and directs entry of an appropriate order "modifying all our outstanding orders to the extent necessary to permit the maintenance of the increased freight rates and charges herein authorized, and granting relief from the provisions of section 4 of the act . . . as may be necessary."[3] (J. S. App. C, p. 792)

The Railroads also suggest that the Commission's final action was "altogether like making a decision not to suspend" (p. 12). On the contrary, the preliminary decision as to whether to suspend was made

[3] The Railroads state that the purpose in filing the petition in *Ex Parte 259* was principally to obtain relief from technical tariff publication rules. (Motion, p. 2) Modification of outstanding Orders and Fourth Section relief was also sought and obtained. These are not technicalities.

by the Commission on June 19, 1968. On that date the Commission suspended the increases in part and instituted an investigation "concerning the lawfulness of all the rates, charges and regulations which were contained in the suspended schedules as aforesaid, as well as the schedules herein authorized to be filed" (Order of June 19, 1968, p. 2). Thereafter a full hearing was held.

There was nothing preliminary about the final order. It was a final order which resolved the issues once and for all after plenary consideration on a complete record.

The Railroads acknowledge that the Commission's order in a Section 15(7) investigation proceeding "whether it results in cancellation of a rate or simply in discontinuance of the proceeding, is of course reviewable in court." (Motion, p. 8) But *Ex Parte 259 was* a Section 15(7) investigation. The Railroads are urging that a Commission order authorizing an increase in some rates is "of course" reviewable, but that an order authorizing an increase in all rates is unreviewable. This would indeed be an anomalous situation.

The Railroads argue that, in spite of the fact that the Commission entered a final order authorizing the increases to go into effect, Appellants still have an adequate remedy by filing a complaint before the Commission. They ignore the fact that this is a class action which seeks review of the lawfulness of the increase as applied to all rates and not the lawfulness of any particular rate or rates.[4] Appellants concede

[4] Appellants are shippers or associations of shippers who are bearing over 20% of the total increase.

for purposes of this lawsuit that if the Commission's order is lawful, their rates as increased are lawful. The proposal that they file proceedings before the Commission attacking the lawfulness of many thousands of rates and then advise the Commission in such proceedings that their only complaint against such rates is that the increases authorized in *Ex Parte 259* were not justified would seem to be answered by its very statement. Appellants have nothing to litigate in a Section 13 case except the issues already litigated in *Ex Parte 259*. And the Commission would not permit such issues to be relitigated in a Section 13 case. (Memorandum, pp. 6-7). That cost of handling particular traffic will be looked at in a case involving rates on that traffic does not mean, as the Railroads seem to suggest, (Motion p. 16) that the Commission will permit such a proceeding to be a vehicle for relitigating issues already decided in a general increase case.

The Railroads state that if the Court notes probable jurisdiction they will urge as an alternative ground for affirming the District Court's judgment that the Commission's order should be sustained on the merits and the complaint dismissed for that reason.

We do not propose to respond to the argument on the merits beyond stating that the complaint in No. 1283 does raise serious issues as to sufficiency of findings and the Commission's interpretation of the statute, as well as questions of substantial evidence. (J. S. p. 5) The court below did not reach these issues; the only question passed on was the availability of judicial review. That is the only issue raised by this appeal and we assume that it is the only one which this court will consider.

CONCLUSION

It is submitted that the Motion of the Railroads to affirm should be denied and probable jurisdiction should be noted. It is also submitted that summary reversal would be appropriate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 106

ALABAMA POWER COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Columbia

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 106

ALABAMA POWER COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Columbia

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court (213a)[1] is not yet officially reported. The initial and final reports of the Interstate Commerce Commission (248a, 281a) are reported at 332 I.C.C. 590 and 332 I.C.C. 714 respectively.

[1] This case has been consolidated for argument with *Atlantic City Electric Company, et al.* v. *United States*, No. 78. Since the issue in both cases is the reviewability of the same orders of the Commission, a Consolidated Appendix has been filed. "a" refers to the Consolidated Appendix. *App.* refers to the Appendix printed as part of this brief.

JURISDICTION

The judgment of the District Court was entered December 18, 1969. Notice of Appeal was filed February 4, 1970. The Jurisdictional Statement was filed March 5, 1970 and probable jurisdiction was noted May 18, 1970. The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b).

QUESTION PRESENTED

May shippers, both individually and as a class, be denied judicial review of Commission orders, entered after hearing and investigation, which (1) authorize across-the-board increases in the level of railroad freight rates and charges, and (2) modify outstanding rate orders and grant Fourth Section Relief to the extent necessary to permit the increases to become effective?

STATUTES INVOLVED

The relevant sections of the Administrative Procedure Act (5 U.S.C. §§ 551, 702 and 704) and of the Interstate Commerce Act (49 U.S.C. §§ 4(1), 13(1), 15(1), 15(7), and 15a(2)) are set forth in the Appendix.

STATEMENT

The Pleadings Below

The complaint seeks review, in behalf of the plaintiffs individually and of all shippers as a class, of the Commission's orders of November 25, 1968, and January 9, 1969, in *Ex Parte No. 259, Increased Freight Rates, 1968* (248a, 281a) which authorize a nationwide increase in the level of railroad freight rates. An intervening supporting complaint was filed by the Secretary of Agriculture. (192a)

The answer of the United States "neither admits nor denies" the allegations of the complaint and "neither supports nor opposes the order of the Commission." (207a) The Commission's answer undertakes to defend its orders on the merits but "expressly waive[s]" jurisdictional defenses. (204a) The railroads intervened as defendants. Their answer contests the Court's jurisdiction, asserting that the Commission's orders are not judicially reviewable. (186a)

The Decision Below

The Court below did not reach the merits. In a 2-1 decision (Wright, J., dissenting) it held that it lacked jurisdiction to review the Commission's orders and dismissed the complaint.

Position of the Parties

The United States, the Commission and the Secretary of Agriculture agree with plaintiffs that the Commission's orders are reviewable and that the judgment of the District Court should be reversed. Only the railroads take a contrary position.

The Commission Proceeding

An increase in a railroad rate or group of rates is usually initiated by publication, on 30 days' notice, of a tariff of the increased rates, which the Commission may investigate and, pending investigation, may suspend for a period of not over seven months (49 U.S.C. § 15(7) *App.* 7). A general increase in rates cannot be instituted that simply, however. Outstanding orders prescribing maximum reasonable rates must be modified before increases in such rates can be published and special permission must be obtained

to publish those increases which result in violations of the long and short haul provisions of Section 4(1) of the Interstate Commerce Act (49 U.S.C. § 4(1) *App.* 4). Moreover, the multitude of rates affected makes publication of new tariffs in the usual way impracticable. The railroads prefer to publish a master tariff with connecting link supplements,[2] but this also requires Commission approval. For these reasons it has become customary for the railroads to institute general increase cases by filing a petition requesting the various forms of relief required before the increases can become effective.

That was done in this case. On March 7, 1968, the nation's railroads filed a petition asking:

> . . . for authority to depart from the Commission's tariff rules, and for such other relief as may be necessary to enable them to publish increases in freight rates and charges to and from points generally throughout the United States, and to and from points in Canada, by means of a master tariff, connecting link supplements and other necessary tariffs and supplements. (227a)

> . . . for the modification of all outstanding orders of the Commission to the extent necessary, (1) to permit, initially, only the publication of the proposed increases in rates and charges, and (2) following the receipt and consideration of evidence in the form of verified statements, to permit the actual charging of the proposed increases upon a finding that the general level of rates as increased will be just and reasonable. (227a)

---

[2] The master tariff contains all of the increases proposed. By supplement to each tariff, the rates therein are made subject to the increases contained in the master tariff.

And for

> . . . such further orders granting new and modified Fourth Section Relief and all other relief that may be necessary to permit the proposed tariffs to become effective without suspension. (234a)

On March 8, 1968, the Commission authorized the filing of the tariffs on 75 days' notice and modified outstanding orders but only to the extent necessary to permit the filing of the tariffs. (236a) On March 11, 1968, the railroads filed their master tariff X-259 containing schedules of increases ranging from 3 to 10 percent and averaging about 5 percent. On June 19, 1968, the Commission suspended the increases to the extent that they exceeded 3 percent and instituted an investigation:

> . . . concerning the lawfulness of all the rates, charges and regulations which were contained in the suspended schedules, as aforesaid as well as the schedules herein authorized to be filed . . . (240-241a)

On July 3, 1968, the Commission divided the proceeding into ten sub-proceedings—"Sub-No. 2—RAILROAD COST AND REVENUE NEED", and Sub-Nos. 3-11, to each of which it assigned one or more commodities or services. (243a) Hearings were held in each of the sub-proceedings. The issue in Sub-No. 2 was the extent, if any, by which the general level of freight rates should be raised. The issues in the other sub-proceedings related to the application of the proposed increases to rates on specific commodities or services. Plaintiffs participated in Sub-No. 2, and in some of the other sub-proceedings and opposed authorization of the increases.

On November 25, 1968, the Commission issued its report and order in Sub-No. 2, authorizing, effective on one day's notice, increases approximating $465 million annually, and modifying existing orders and granting Fourth Section Relief to the extent necessary to permit the increases to become effective. (248a, *App.* 9[3]) On January 9, 1969, it issued a further report and order devoted primarily to the distribution of the authorized increases among the various commodities and services. That report adopts the findings of the November 25 report with respect to the railroads' revenue needs "as though fully restated." (282a) It is necessary, therefore, to go to the earlier report to determine the basis for such findings.

In the November 25 report the Commission based its ultimate finding as to revenue needs on a single subsidiary finding—that the increases sought, together with those authorized in *Ex Parte No. 256, Increased Freight Rates, 1967*, 332 I.C.C. 280, were less than the increases in operating costs incurred since 1966.[4] It justified use of 1966 as a base year as follows:

> Use of 1966 as a base year is reasonable, and fair to shippers, because it reflects recent experience not complicated by a major rate revision, and the traffic volume is close to the current level. (263a)

[3] The order portion of the November 25, 1968, report and order was inadvertently omitted in the printing of the Consolidated Appendix. It is included in the Appendix printed as part of this brief.

[4] The Commission also referred to the railroads' rate of return as "inadequate" and "substandard" but stated that its decision "rests upon other grounds". (265a) The Commission's brief in the Court below disavows any reliance on rate of return and chides plaintiffs for discussing it, stating that "plaintiffs are 'tilting at windmills' for the Commission conceded that rate of return was not a statutory standard of rate making." (p. 20.)

The Commission made no findings as to the amounts needed for such things as debt service, dividends and capital improvements. It ignored, for example, the fact that the railroads had represented to the Commission in *Ex Parte No. 256, Increased Freight Rates, 1967*, that the funds needed for capital improvements in 1967 would be more than a half billion dollars less than in 1966[5] and did not consider the extent to which a reduction in the need for capital expenditures might reduce the need for increased revenues. Furthermore, despite demonstrated wide differences in the financial needs of the railroads in the eastern, western and southern parts of the nation, it authorized the same measure of increase nationwide without stating any justification for such action.

In the Court below plaintiffs challenged the lawfulness of the Commission's orders on a number of grounds, including failure to apply the standards and make the findings required by Sec. 15a(2) of the Interstate Commerce Act, lack of requisite subsidiary findings and lack of substantial evidence. The District Court declined to pass on these issues and dismissed the complaint on jurisdictional grounds.

If the Court agrees that the District Court was in error in holding that the Commission's orders are not reviewable, we assume that it will remand the case to the District Court for a determination on the merits. Accordingly, we are briefing only the jurisdictional question.

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[5] In 1966 the railroads spent $1,953 million on capital improvements. In *Ex Parte No. 256* the 25 "test roads" (about 87 percent of the railroad industry) advised the Commission that they expected to spend "over $1,233 million" for capital improvements in 1967. *Ex Parte No. 256, Increased Freight Rates, 1967*, 329 I.C.C. 854, 873.

SUMMARY OF ARGUMENT

The basic principle governing judicial review of administrative orders is that review will not be denied unless "there is persuasive reason to believe" that Congress so intended. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140. The Commission orders here challenged authorize a nationwide increase in railroad freight rates and Congress has expressly provided for judicial review both in 28 U.S.C. § 1336 and in the Administrative Procedure Act, 5 U.S.C. §§ 551(4)(13), 704.

The Commission's Report and Order of January 9 are the last step in the general increase proceeding. In it the Commission authorized the railroads to make the increases effective, found that the rates as increased did not exceed a maximum reasonable level and that the additional revenues to be derived from the increases were necessary to permit the railroads to provide adequate and efficient railway transportation service and ordered the proceeding discontinued. The Commission action clearly meets all accepted standards of finality.

The majority of the District Court viewed the case as governed by *Algoma Coal and Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.), and dismissed the action on the grounds that (1) the Commission orders were permissive and (2) plaintiffs have available an administrative remedy by filing a complaint with the Commission challenging "any particular rates which affect them". The permissive order doctrine was finally put to rest in *City of Chicago* v. *United States*, 396 U.S. 162, and the railroads disclaimed reliance on it in their Motion to Affirm.

The Commission order meets the accepted tests of ripeness as set out in *Abbott*, pp. 148-9, notwithstanding the reservation to interested parties of the right to bring "maladjustments" to the Commission's attention for correction by filing a subsequent complaint. Such a reservation has never been held to impair either the finality of agency action or its ripeness for judicial review.

Plaintiffs have no further administrative remedy. They are not complaining of maladjustments in specific rates but of the general increase as applied to all rates. A subsequent complaint case would afford no opportunity to obtain a re-examination by the Commission of its order permitting a general increase. The Commission has expressly so held and this is eminently reasonable. Having completed a full investigation, the Commission should not re-till the same ground in individual rate cases.

In addition to authorizing rate increases, the Commission modified all outstanding orders and granted blanket Fourth Section Relief to the extent necessary to permit the authorized increases to become effective. Such action provides additional bases for judicial review.

ARGUMENT

I

An Order Authorizing a General Increase in Rates Is Subject to Judicial Review

In determining whether an order of an Administrative Agency is judicially reviewable, the starting point is the principle that

> . . . judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the

purpose of Congress. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140.[6]

This principle was reaffirmed in *City of Chicago* v. *United States*, 396 U.S. 162, 164 and in *Barlow* v. *Collins*, 397 U.S. 159, 166.

Neither the Court below nor the railroads in their Motion to Affirm have pointed to anything suggesting a Congressional purpose to deny judicial review of the orders here involved. On the contrary, Congress has expressly provided for judicial review. The Administrative Procedure Act provides for review of orders approving or prescribing rates[7] and 28 U.S.C. § 1336 provides for review of Commission orders generally.

What is there about the Commission's orders here challenged which could possibly make these clear statutory provisions inapplicable? In the Court below the railroads argued that the Commission's orders are un-

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[6] This Court has frequently reiterated that the "generous review provisions" of the APA must be given a "hospitable interpretation". *Abbott Laboratories, supra*, p. 141. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51, *Data Processing Service* v. *Camp*, 397 U.S. 150, 156.

[7] "'rule' . . . includes the approval or prescription for the future of rates . . ." 5 U.S.C. § 551(4).

"'agency action' includes the whole or a part of an agency rule . . ." 5 U.S.C. § 551(13).

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

We do not understand that there is any contention that "statutes preclude judicial review" or that the Commission's action is "committed to agency discretion by law" within the exception in 5 U.S.C. § 701(a).

reviewable because permissive and the opinion of the majority of the District Court appears to be based, at least in part, on the permissive nature of the Commission's action. This argument has now been abandoned. The railroads now concede that a contention

> . . . that the Commission's order is unreviewable because it is permissive or negative in form. * * * is not tenable today. (Motion to Affirm, p. 14.)

The railroads' present position is that we are dealing with a "preliminary" order[8] and that plaintiffs are not entitled to Court review until they have filed and litigated a complaint under Sec. 13 of the Interstate Commerce Act against the rates in which they are interested.

The argument that a complaint must be filed under Sec. 13 indicates a misunderstanding of the relationship between Sec. 13 and Sec. 15(7) of the Interstate Commerce Act. The two sections provide alternative and not successive procedures. If the Commission institutes an investigation of rates after a tariff has been filed but before the rates have become effective, it proceeds under Sec. 15(7); if the rates are already in effect, it proceeds under Sec. 13. Under both sections the Commission may act either upon complaint of an interested party or upon its own initiative.

The Commission proceeding here involved was a Sec. 15(7) case. After obtaining the preliminary authority needed to permit them to do so, the railroads published the schedule of increased rates. Sec. 15(7) authorizes the Commission "upon complaint or upon

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[8] The railroads' Motion to Affirm characterizes the Commission action in this proceeding as preliminary no less than seven times. See Reply to Motion, pp. 2, 3.

its own initiative without complaint" to investigate the lawfulness of any proposed rate and to suspend its effectiveness for a period not longer than seven months. The Commission, acting under the authority of Sec. 15(7), suspended the schedules in part and instituted an investigation.

Once an investigation has been instituted, a Sec. 15(7) case is distinguishable from a Sec. 13 case only in that the burden of proof is on the carrier instead of on the complainant. The Rule of Rate Making set out in Sec. 15a(2) must be followed alike in Sec. 15(7) and in Sec. 13 proceedings and the Commission may make any order in the one that it could make in the other. Sec. 15(7) provides that:

> . . . after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.

The fact that an order is issued under Sec. 15(7) rather than under Sec. 13 does not preclude judicial review. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268.

The Commission's orders in this case are final by any accepted standard. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, *Frozen Food Express* v. *United States*, 351 U.S. 40. The action taken in the November 25 order in the Sub-No. 2 proceeding finally disposed of the question of revenue need. The

Commission found that, without the additional revenue involved, earnings would be insufficient to enable the railroads to provide adequate and efficient transportation service. It also found that "The increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges" (275a) and ordered that "freight rates and charges, to the extent authorized herein, may be made effective upon no less tahn 1 day's notice." (*App.* 9) The Commission's Report and Order of January 9 dealing with individual commodities adopts the findings in the earlier report as to revenue needs; and finds that "The increased freight rates and charges authorized herein will not exceed a maximum reasonable level." The Commission allowed the rates to be made effective on less than statutory notice and ordered "that this proceeding be, and it is hereby, discontinued." (395a)

"Preliminary" is a strange way to characterize an order which finally disposes of the question of revenue needs, authorizes increased rates to be put into effect, finds that the rates authorized will not exceed a just and reasonable level and discontinues the proceeding.

The railroads appear to hang their contention as to the "preliminary" nature of the general increase proceeding on the following finding which appears in both Reports:

> Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, *and will not preclude interested parties from bringing*

> *any maladjustments to our attention for correction.*[9] The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370,[10] and will, in all respects, be subject to complaint and investigation as provided by the act. [Finding 5. November 25 Report] (275-276a); [Finding 15. January 9 Report] (393a).

In the general field of regulation the rate case involving the revenue needs of the regulated utility is the norm rather than the exception. In such cases there are two separate and distinct issues. As stated in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 584:

> The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establishing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions.

This is precisely what the Commission did in *Ex Parte No. 259.*

To our knowledge this Court has never held that an order adjusting a general level of rates is not a final order subject to review until the regulatory agency

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[9] Emphasis supplied in this brief unless otherwise noted.

[10] That rates are approved rather than prescribed does not affect the reviewability of a rate order " 'rule' . . . includes the approval or prescription for the future of rates." 5 U.S.C. § 551(4).

has resolved all of the problems involved in adjusting individual rate schedules. In *Permian Basin Area Rate Cases,* 390 U.S. 747, the Court reviewed a Federal Power Commission order establishing a general level of rates, which contained a provision described by the Court as follows:

> The Commission declared that a producer should be permitted "appropriate relief" if it establishes that its "out-of-pocket expenses in connection with the operation of a particular well" exceed its revenue from the well under the applicable area price. 390 U.S. 747, 770-771

This provision is indistinguishable in principle from the provision in the orders here involved permitting interested parties to bring "maladjustments" to the Commission's attention for correction. Also indistinguishable is the *New England Divisions Case,* 261 U.S. 184, in which the Commission prescribed a general basis for divisions between the New England and other railroads but "left the door open for correction upon application of any carrier in respect to any rate." (p. 187) Similarly, in *Frozen Food Express* v. *United States,* 351 U.S. 40, this Court held reviewable an order of the Interstate Commerce Commission specifying the commodities deemed to fall within the class of exempt agricultural commodities, despite "the Commission's willingness, in individual cases, to reconsider its determination with respect to particular commodities . . . ." (P. 47, dissenting opinion) In none of these cases was the retention by the Commission of jurisdiction to correct specific maladjustments deemed to make its order unreviewable.

The question of when agency action is ripe for review was given extensive consideration by this Court

in three cases dealing with regulations issued by the Commissioner of Food and Drugs, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, and *Gardner* v. *Toilet Goods Association*, 387 U.S. 167.

The rationale of the ripeness doctrine was stated in *Abbott Laboratories* as follows:

> . . . it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. 387 U.S. 136, 148-149

The application of this doctrine can be illustrated by contrasting the regulations held reviewable in *Gardner* with the one held unreviewable in *Toilet Goods Association*.

Gardner and *Toilet Goods Association* were separate appeals from a decision of the Court of Appeals for the Second Circuit. The regulation challenged in *Toilet Goods Association* provided that the Commissioner of Food and Drugs "may immediately suspend certification service"[11] if officials are denied access to "all manufacturing facilities, processes and formu-

[11] The Color Additive Amendments of 1960 require certification of each "batch" of color additive unless exempted by regulation. 21 U.S.C. § 376(e).

lae involved in the manufacture of color additives and intermediates from which such color additives are derived;" 387 U.S. 158, 161.

This regulation was held not to be ripe for judicial review because:

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. 387 U.S. 158, 163. (Emphasis in original)

One of the three regulations challenged in *Gardner* can be taken as illustrative. It defined color additives as including "diluents" (certain components of a color additive mixture which are not themselves color additives). Plaintiffs could have obtained further administrative review by submitting each color additive for premarketing clearance but the Court found that the burden of doing so would be substantial and that the regulations were ". . . ripe for judicial review under the standards elaborated in *Abbott Laboratories* v. *Gardner, supra,* namely the appropriateness of the issues for judicial determination and the immediate severity of the regulations' impact upon the plaintiffs." 387 U.S. 158, 170

That the orders here involved are reviewable under the *Abbott* standards would seem to follow, *a fortiori.* The increase in the general level of freight rates approved by the Commission is costing shippers hundreds of millions of dollars annually. The impact of the

Commission's decision upon plaintiffs has certainly been severe and the hardship to them of withholding Court action would be substantial. There is no possibility of the Court entangling itself in an administrative proceeding which is still awaiting a final determination. The Commission has made its decision and terminated the proceedings. There is nothing more for it to do.

Unlike the situation in *Gardner, supra,* shippers will have no opportunity to obtain further Commission review of its action.[12] The only thing left open in the Commission's order is the right to bring "maladjustments to our attention for correction" in another proceeding. But plaintiffs are not complaining of maladjustments in this case. They challenge the bases for the general increase itself.

The further administrative remedy suggested by the Railroads of filing complaints with the Commission against the myriad rates in which plaintiffs are interested, even aside from its obvious impracticability, is no remedy at all. In such proceedings the Commission would determine the lawfulness of each individual rate by measuring it against the new standards of reasonableness established in the orders here challenged. *Matthiessen & Hegeler Zinc Co.* v. *Baltimore*

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[12] Sec. 10 of the Administrative Procedure Act (5 U.S.C. § 704, *App.* 4) is relevant as indicating the intent of Congress that parties not be required to continue to try to persuade a regulatory agency to reverse action already taken. It provides that "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

& O.R. Co., 323 I.C.C. 601, *Alabama State Docks Dept.* v. *Alabama, T. & N. R. Co.*, 321 I.C.C. 347; *AGSCO Chemical, Inc.* v. *Alabama Great Southern R. Co.*, 314 I.C.C. 725.

Thus, in *Alabama State Docks Dept.*, in finding that the assailed rates were not unjust and unreasonable, the Commission held:

> However, the assailed rate is below the maximum level prescribed on domestic clean rice in *Arkansas Rice Traffic Bureau* v. *Aberdeen & R.R. Co.*, 219 I.C.C. 5, 25, *as adjusted for general increases.* 321 ICC 347, 353

The argument that a shipper should seek re-examination of the cost and revenue findings in a general increase case by filing a subsequent complaint case with the Commission might be more persuasive if the Commission had not already ruled that this avenue is not open. In *Koppers Co., Inc.* v. *Chesapeake & O. Railroad Co.*, 303 I.C.C. 383, the complainant in a Sec. 13 proceeding sought to have the Commission consider whether increases authorized in a general increase case had been justified. The Commission declined to do so, stating:

> The complainant introduced in evidence a series of exhibits containing certified copies of the record in the Ex Parte No. 175 proceeding bearing upon the level of the water-transportation costs as between the New England and the New York ports. In this manner, it purports to attack our order in that proceeding. Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding. 303 ICC 383, 387

The Memorandum filed jointly by the United States, the Commission and the Secretary of Agriculture concedes that in *Koppers* "the Commission appears to have taken" the position that review in a subsequent complaint case of cost and revenue findings which are the foundation of a general rate increase order would be improper. (pp. 6-7).

The rule established in *Koppers* is eminently reasonable. Good administrative practice dictates that the Commission should not reopen in a subsequent proceeding—let alone in a multitude of subsequent proceedings—issues just decided after extensive hearings.

In asserting that plaintiffs must file a complaint with the Commission under Sec. 13 before seeking Court review, the railroads (and the Court below) place major reliance on *Algoma Coal & Coke Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va.). The plaintiffs there were not disputing the Commission's findings as to railroad revenue needs and did not seek to have the Commission's order overturned. They asked that it be set aside only as to specific rates on coal. As the Court noted, the requested action could "inject confusion and create discrimination as between the plaintiffs and coal operators in other territories . . ." (p. 492) and would be "necessarily inconsistent with the whole scheme of the Interstate Commerce Act which requires uniformity and nondiscrimination as to rates" (p. 496). Such policy considerations, whether or not they require that the Commission be afforded an opportunity to correct alleged maladjustments in particular rates before the Courts intervene, have no application where the challenge is to the bases for the general increase and not to the application of the increase to specific rates.

To assert that plaintiffs who are challenging the increase as to all rates have not exhausted their administrative remedies until they have filed complaints under Sec. 13 seems a bit farfetched. Since this is a class action, the filing of complaints on *all* rates would presumably be required.[13] Is there any rational basis for a rule which would require plaintiffs to file Sec. 13 complaints attacking the lawfulness of all rates, and then advise the Commission that they raise no question as to the distribution of the authorized increase among the various rates and commodities and wish to litigate in each of these cases the question—and only the question—whether the general increase in rail rates previously authorized was lawful? Surely this question answers itself.

II

Orders Modifying Outstanding Orders and Granting Fourth Section Relief Are Subject To Judicial Review

A. ORDERS MODIFYING OUTSTANDING ORDERS

The Commission hears many cases concerning the lawfulness of freight rates in the course of a year. If the shipper is granted relief, the final order limits

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[13] That this is a proper class action was recognized by Judge Wright in his dissenting opinion. (218a) All of the requirements of Rule 23, Federal Rules of Civil Procedure, are met. The class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims or defenses of the representative parties (who are shippers or representatives of shippers paying over 20 percent of the nation's freight bill) are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protect the interests of the class. In addition, the Commission and the railroads have acted or refused to act on grounds generally applicable to the class, and separate actions would create risk both of inconsistent adjudications and of adjudications which as a practical matter would be dispositive of the interests of other shippers.

the freedom of the railroads to initiate new rates by simply publishing new schedules. If an order prescribes the maximum reasonable rate on commodity X between points A and B, the railroads cannot increase that rate without further action by the Commission. It is therefore necessary for the railroads in a general increase case to obtain an order modifying all outstanding orders unless they propose to make the increases inapplicable to the rates covered by outstanding orders. The railroads sought and obtained such an order in this case. The November 25 order provides:

> . . . That, all outstanding orders of the Commission be, and they are hereby modified to permit the increases authorized herein to become effective. (*App.* 11)

The January 9 order provides:

> . . . That outstanding orders in other proceedings are hereby modified so as to permit establishment of the further changes in interstate freight rates and charges herein authorized; (395a)

The modification of outstanding orders was ignored in the opinion of the Court below but was noted by Judge Wright in his dissenting opinion:

> The effect of the order was to remove the upper limits on rates which the Commission had prescribed for certain commodities. Without this order, the railroads could not have increased any of the Commission-made rates. (217a)

What would be the situation of a shipper who, after years of litigation and the expenditure of thousands of dollars, obtained an order from the Commission on November 24, 1968, fixing a maximum lawful rate on

a movement of a commodity only to see the order set aside on the following day by the Commission's order in Ex Parte No. 259? He has clearly been directly aggrieved by the Commission's order. Surely he should not be required to go back to the Commission and relitigate the entire case which had just been concluded.

Chicago, Burlington & Quincy Railroad Co. v. *United States*, 242 F.Supp. 414, aff'd 382 U.S. 422, involved review of a Commission order in one case which reopened two other cases without notice to the parties and modified the orders therein. The Court reviewed this order and set it aside on the ground that it had been issued without notice to the parties in such proceedings. If an order modifying an outstanding order in two cases is subject to Court review, it would seem to follow that an order modifying *all* outstanding orders in *all* cases is likewise reviewable.

B. ORDERS GRANTING FOURTH SECTION RELIEF

Section 4(1) of the Interstate Commerce Act makes it unlawful for a railroad, without authorization from the Commission:

> . . . to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter . . .

Fourth Section departures in the railroad rate structure are commonplace. A general increase in

rates, particularly when it includes holddowns and special provisions, inevitably produces additional Fourth Section departures. Unless blanket authorization were obtained, the railroads could not therefore inaugurate a general increase without violating the Act unless they were to go through all of their tariffs and eliminate any increase which would bring about a new violation of Section 4. Accordingly, the railroads asked and were granted blanket Fourth Section Relief. The November 25 order contains a supplemental Fourth Section order which provides *inter alia:*

> . . . That, carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to depart from the provisions of Section 4 of the act to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte No. 259 of this date, November 25, 1968. (*App.* 11)

A similar supplemental Fourth Section order was entered on January 9, containing a provision identical to that quoted above except for the date.

That Fourth Section orders are reviewable is established by *A. L. Mechling Barge Lines, Inc.* v. *United States,* 376 U.S. 375.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

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APPENDIX

Administrative Procedure Act

5 U.S.C. § 551.

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency

proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

5 U.S.C. § 702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 704.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy

in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Interstate Commerce Act

49 U.S.C. § 4(1).

It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establish-

ment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further,* That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further,* That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

49 U.S.C. § 13(1).

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be

relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

49 U.S.C. § 15(1).

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare,

or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

49 U.S.C. § 15(7).

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by

order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions then pending before it and decide the same as speedily as possible.

49 U.S.C. § 15a(2).

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 25th day of November, A. D. 1968.

EX PARTE NO. 259
INCREASED FREIGHT RATES, 1968

The Commission having this day made a report containing its findings of fact and conclusions thereon with respect to the increased operating costs and additional revenue needs of the respondent railroads, together with other related matters, which report is hereby referred to and made a part hereof:

It is ordered, That, the petition filed by the respondents for leave to file a petition to vacate the order of suspension be, and it is hereby, granted.

It is further ordered, That, the order of June 19, 1968, be, and it is hereby, vacated and set aside insofar as it suspended the increases in rates and charges on all schedules except those set forth in Tariff Items 515 and 845 of the Tariff of Increased Rates and Charges, X-259, issued jointly by Western Trunk Line Committee, Agent, I.C.C. No. A-4696, and other designated agents, but that the suspension of schedules of increases contained in said Items 515 and 845 and the proceeding of investigation into all increases shall continue in full force and effect;

It is further ordered, That, the order of June 19, 1968, be, and it is hereby, vacated and set aside insofar as it limited any authorized increases to not exceed 3 percent or the maximums indicated, except as to the aforesaid Tariff Items 515 and 845, as to which the said 3 percent and the maximums shall continue to apply;

It is further ordered, That, the order of June 19, 1968, except to the extent modified herein shall remain in full force and effect until the further order of the Commission.

It is further ordered, That, freight rates and charges, to the extent authorized herein, may be made effective upon no less than 1 day's notice to the Commission and to the general public, by filing and posting in the manner prescribed in the Interstate Commerce Act;

And it is further ordered, That, all outstanding orders of the Commission be, and they are hereby modified to permit the increases authorized herein to become effective.

SUPPLEMENTAL FOURTH SECTION ORDER NO. 20213

It appearing, That, the Commission, by fourth-section order No. 20213 entered June 19, 1968, authorized carriers parties to the proceeding, Ex Parte No. 259, Increased Freight Rates, 1968, to establish and maintain the increased rates and charges described therein without observing the provisions of Section 4 of the Interstate Commerce Act;

It further appearing, That the Commission on this date has entered a further order in Ex Parte No. 259, authorizing certain increases in rates and charges for the transportation of property over lines of carriers parties to the proceeding within the United States, and that such increases cannot be made effective without producing in some instances rates or charges that yield greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, over direct routes, or greater compensation as a through rate or charge than the aggregate of intermediate rates or charges subject to the Act, in contravention of Section 4 of the act; and that carriers parties to the proceeding have applied for relief from the provisions of Section 4 to the extent necessary to establish the authorized increases, which order and prior orders in Ex Parte No. 259 are hereby referred to and made a part hereof;

It is ordered, That, fourth-section order No. 20213, entered as aforestated, be and it is hereby, modified by adding the following paragraphs thereto:

It is further ordered, That, carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to depart from the provisions of Section 4 of the act to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte No. 259 of this date, November 25, 1968.

It is further ordered, That, carriers parties to said proceeding be, and they are hereby, authorized to establish and maintain rates and charges authorized in the order of this date, November 25, 1968, without observing the long-and-short-haul provision of Section 4 of the act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by failure of the State authorities to authorize the full increases permitted in said proceeding.

And it is further ordered, That, in those instances in which rates and charges in contravention of Section 4 of the Act are established under the authority contained herein, the schedules containing such rates and charges shall make reference to this order in the manner required by rule 28 of Tariff Circular No. 20.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

[redacted]

[redacted]

[redacted]

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IN THE

Supreme Court of the United States

October Term, 1970

No. 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLANTS

Opinion Below

The opinion of the District Court is reported at 306 F. Supp. 338, and appears at Consolidated Appendix (C.A.), p. 153a. The interim and final decisions of the Interstate Commerce Commission ("ICC" or "Commission") are reported at 332 I.C.C. 590 and 332 I.C.C. 714, respectively. They appear at C.A. p. 248a and C.A. p. 281a, respectively.

Jurisdiction

The order of the District Court was dated October 28, 1969 and was entered on that day. The notice of appeal from that order was filed in the District Court on December 18, 1969. The Jurisdictional Statement was filed January 16, 1970 and this Court noted probable jurisdiction on May 18, 1970. The jurisdiction of this Court rests on 28 U.S.C. §§1253 and 2101(b).

Statutes Involved

Sections 1253, 1336, 2101(b), 2284 and 2321-2325 of Title 28, U.S.C., the Administrative Procedure Act, 5 U.S.C. §§ 556(d) and 556(e); Judicial Review, 5 U.S.C. §§ 701(a), 702, 703, 704, 706; the Interstate Commerce Act, Sections 1(5), 3(1), 13, 15(1), 15(7), 15a(1) and (2), 17(3) and 17(9), 49 U.S.C. §§ 1(5), 3(1), 13, 15(1), 15(7), 15a(1) and (2), 17(3) and 17(9); as amended, are set forth in the Appendix to this brief.

Question Presented

Does immunity from judicial review attach to the procedures followed by the ICC during an investigatory hearing on a general rail rate increase, and to the final order deciding issues raised therein?

Statement

The controversy before the Court arose from an order of the Interstate Commerce Commission (C. A. pp. 281a to 398a, 332 I.C.C. 714) dated January 9, 1969 which authorized the railroads of the United States to increase their rates for the transportation of virtually all of the nation's freight, by percentages varying from 3% to 10% on different commodities, and sometimes varying on the same commodities from different regions.

Appellant* electric utility companies ("Utility Appellants") filed a complaint in the United States District Court for the Southern District of New York seeking a permanent injunction against the Commission's January 9th order. The United States was joined as a mandatory defendant but took no active part in the proceedings in the court below. The Appellants, the State of New York (on behalf of its citizens engaged in agriculture), and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts ("State Appellants") moved to be permitted to intervene as plaintiffs, and the Class I railroads of the United States ("railroads"), moved to be permitted to intervene as defendants. Both motions were granted.

Utility Appellants' complaint (C.A. pp. 3a et seq.) recited the history of the proceeding before the Commission, to wit:

> In March, 1968, the defendant railroads filed with the Commission "Master Tariff X-259" which provided for rate increases on virtually all commodities carried by the railroads (¶6, C.A. pp. 5a-6a),** such increases varied by commodity, and in some instances, by region from 3% to 10% (¶6, C.A. pp. 5a-6a). After receiving numerous protests; by order of June 19, 1968 (¶6, C.A. pp. 5a-6a) the ICC permitted an interim increase of 3% on all commodities, suspended the

* The Utility Appellants here are Atlantic City Electric Company, Niagara Mohawk Power Corporation, Public Service Electric and Gas Company, and Rochester Gas and Electric Corporation. Two of the Appellants below, Central Hudson Gas & Electric Corporation and Orange and Rockland Utilities, Inc., are not taking part in this appeal because, subsequent to the ICC order raising freight rates and the decision below holding that action unreviewable, they ceased to ship substantial quantities of fuel by rail.

** Numbers refer to paragraphs in Utility Appellants' complaint; additional facts set forth in State Appellants' complaint follow.

tariff; and ordered investigatory hearings on the proposed increases (¶6, C.A. pp. 5a-6a):

At those hearings, to which plaintiffs and intervening plaintiffs were parties, there was no evidence presented in support of the justness and reasonableness of the proposed rates. The Commission itself took no part in the proceedings it conducted, never by its Staff or counsel examining into the justness and reasonableness, or any other aspects, of the proposed increases (¶9, C.A. p. 7a). No bureau, section or employee of the Commission was a party to the proceedings, or appeared therein to testify, nor was there any representation of the national consumer interest by the Commission through its counsel or otherwise (¶10, C.A. p. 7a).

There was no evidence presented by the railroads as to their costs for providing the transportation services for any commodity, although such evidence was requested by plaintiffs, intervening plaintiffs and many other parties to the proceedings. All such requests were repeatedly refused by the railroads and such refusals were upheld by the Commission (¶12, C.A. p. 8a). There was no evidence in the record to refute evidence presented by shippers that the railroads would incur substantial loss of traffic if the proposed increases became effective (¶13, C.A. p. 8a)*.

* Subsequent history has demonstrated the accuracy of plaintiffs' allegations. The increases which the Commission approved on the traffic of the original eleven plaintiff utilities who opposed the railroads before the ICC were intended to produce additional revenue of $2.7 million annually. However, those increases in fact resulted in an actual loss of $12.6 million in annual revenues to the railroads because six of those companies ceased to ship large volumes of coal, due in large part to the lower delivered price of fuels not using rail transport. Freight charges constitute approximately one half of the delivered cost of coal in the northeast. It is apparent, therefore, that the Commission's constant accession to the railroads' demands for increased rates (requests were filed and approved in 1967, 1968, 1969 and 1970) has failed, at least on some major traffic, to produce increased revenues and has contributed substantially to the present plight of the railroads.

There was no evidence presented by the railroads to justify their requested increases of 3% on some commodities, 5% on others, and 10% on still others (¶14, C.A. p. 9a). However, there was substantial and uncontroverted evidence presented by shippers, including plaintiffs and intervening plaintiffs, that some commodities, prior to the imposition of the requested increases, produced a disproportionate return to the railroads over and above the cost to them for providing the transportation service for that traffic (¶14, C.A. p. 9a).

In addition to the general findings which the Commission made with respect to all increases, it also made specific findings with respect to many commodities, including bituminous steam coal, feed and grain (¶13, C.A. p. 8a). It based its findings as to the effect of the proposed rates on the movement of coal traffic on its opinion that "costs of other forms of transportation, and of competing fuels are also increasing" (¶13, C.A. p. 8a), for which opinion there was no supporting evidence; and upon the explicit assumption that "should a competitive situation arise, appropriate adjustments can be made by producers and carriers", although there was not a scintilla of evidence in the record to support the assumption that "adjustments can be made" by coal producers, who, of course, are not subject to ICC jurisdiction (¶13, C.A. p. 8a).

As to grain, the Commission refused to consider a cost study submitted by State Appellants, which demonstrated that that traffic showed a disproportionately high contribution to rail revenues before the requested increases were imposed upon it. (Intervening plaintiffs' complaint, ¶10(a), C.A. p. 40a.)

The Commission's order holding that intervening plaintiffs suffered no undue prejudice was based on a misconception concerning the percentage increase authorized in other regions. (Intervening plaintiffs' complaint, ¶ 10(c), C.A. pp. 40a-41a.)

For the purpose of the ICC's motion below, all of the above facts alleged in the complaint were admitted, since the Commission moved under Rule 12(b) of the Federal Rules of Civil Procedure to dismiss plaintiffs' complaints. It is submitted that the court below, in granting the ICC's motion, failed to apply correctly the relevant statutes to the facts herein, and committed error in refusing to allow these utilities, the State of New York, and the Departments of Agriculture of the northeastern states to present their case.

Summary of Argument

An order of the ICC, entered after suspension of and investigation into the railroads' proposed increased freight rates, is ripe for judicial review under the principles of reviewability enunciated by this Court in the *Abbott Laboratories*, 387 U.S. 136 (1969), *City of Chicago*, 396 U.S. 162 (1969), *Data Processing*, 397 U.S. 150 (1969) and *Barlow*, 397 U.S. 159 (1969) decisions. No administrative remedy remains to Appellants, who were immediately, directly and adversely affected by the ICC order. No "clear and convincing evidence" (*Abbott Laboratories*, at 141) in the relevant statutes precludes judicial review. In fact, unambiguous, pertinent provisions in the Judicial Code (the Urgent Deficiencies Act of 1913, 28 U.S.C. §1336) and the Administrative Procedure Act provide for review.

The alternative presented to the Court by Appellees—that Appellants should file a complaint in the ICC pursuant to Section 13 of the Interstate Commerce Act—is no substitute for judicial review because:

1. No review of the Commission's procedures in arriving at its order in the general revenue proceeding may be had in a Section 13 action, as the Commission itself has specifically held;

2. Although under the Administrative Procedure Act and § 15(7) of the Interstate Commerce Act it is the duty of the carrier to prove that proposed increased rates are just and reasonable, in a Section 13 proceeding the burden of proof would be transferred to a shipper to prove that the increased rates are unjust and unreasonable; and

3. Section 13 is directed to obtaining relief from a carrier, not from the Commission.

The decision of the court below should be reversed and that court should be directed to hear Appellants' complaints on the merits.

ARGUMENT

Should this Court affirm the decision of the court below, it will have denied to these Appellants, and indeed to all the nation's consumers of railroad-transported commodities, the right to obtain any judicial review of the procedures followed and orders issued by the ICC in permitting increases in railroad freight rates. Under the existing statutes (see 28 U.S.C. §1336, *infra*, p. A-1), a three-judge district court is the only forum that can review the Commission's procedures and orders.* There are no administrative remedies remaining to Utility and State Appellants by which these procedures and order can be reviewed.

The railroads urged dismissal of Appellants' complaints on the grounds that shippers may not obtain judicial review of their specific freight rates when those rates

*There is no contention that Appellants had not complied with the procedures set forth in 28 U.S.C. §§2321-2325 (see, *infra*, p. A-3), regarding actions in district courts to enjoin ICC orders.

have been approved by the ICC in a "general revenue" proceeding which also set rates for all commodities. This argument is based upon a characterization of these complaints which constitutes a fundamental misinterpretation of those complaints and which resulted in the court below mistaking their true nature. The complaints did not seek review of coal and grain rates; they sought review of the legality of the procedures followed by the ICC in arriving at its order permitting those rates to become effective. Appellants sought a determination whether the order had the evidentiary basis required by law, and whether the procedures followed by the ICC in arriving at the conclusions expressed therein were in conformity with applicable legal standards.

I.

The Urgent Deficiencies Act of 1913 and the Administrative Procedure Act Provide for Review

The Urgent Deficiencies Act, now embodied in 28 U.S.C. § 1336 (*infra*, p. A-1) provides that United States District Courts have jurisdiction of any civil action to enjoin any order of the ICC.

The Administrative Procedure Act (5 U.S.C. §702, *infra*, p. A-6) provides that a person adversely affected or aggrieved by agency action is entitled to judicial review thereof.

Utility Appellants obviously are adversely affected by the ICC's order which permitted the railroads to increase freight charges to them by some $1.5 million annually. State Appellants are adversely affected by the order which tends to favor the agricultural products of the southeastern states over those of the northeastern states. Both groups of Appellants assert that all such increases were

illegally imposed, since permission to file them was granted after a hearing during which no evidence was presented by the railroads, or required by the Commission, that the increased rates would be just and reasonable; and during which the railroads were not required by the ICC to sustain their burden of proof as that burden is imposed on them by the Interstate Commerce Act and the Administrative Procedure Act.

The Administrative Procedure Act (5 U.S.C. §706, p. A-7, *infra*) empowers the reviewing court to hold unlawful and to set aside agency action which is found to be contrary to constitutional right, unsupported by substantial evidence, or without observance of procedures required by law. As noted above, Appellants' complaints charge that the Commission's actions meet all these criteria of unlawfulness and should therefore be reversed. The factual accuracy of Appellants' complaints was necessarily admitted by the motion below.

II.

Prior Decisions of This Court Have Held Similar Agency Actions Reviewable

During its October 1969 term, this Court decided three cases which directly support Appellants' right to a review of the ICC action complained of. In each of those cases, the Court found that the agency's actions were subject to judicial review.

The first of these cases was *City of Chicago* v. *U. S.*, 396 U. S. 162 (1969), where Mr. Justice Douglas, writing for a unanimous Court, stated that the question was:

> "whether orders of the Interstate Commerce Commission discontinuing investigations • • • are judicially reviewable on the complaint of aggrieved persons."

The Court concluded that such orders were judicially reviewable, reversing the contrary decision below.

In that case, certain railroads had filed notices of discontinuance of various interstate passenger train services, and the Commission found, after conducting an investigatory hearing, that continued operation of the trains was not required by the public convenience and necessity and that such continued operation would unduly burden interstate commerce. It thereupon entered an order terminating its investigation of the proposed discontinuances and permitting them to become effective.

The same basic procedure was followed by the ICC in the instant case: its final order herein (see C.A. pp. 281a to 398a) terminated its investigation into the increased tariffs and permitted them to become effective.

The Court held in *City of Chicago:*

> "A decision to investigate indicates that a substantial question exists under the statutory standards. The Commission's report therefore deals with the merits. We cannot say that an answer that discontinuance should not be allowed is agency 'action,' while an answer saying the reverse is agency 'inaction.' The technical form of the order is irrelevant. In each case the Commission is deciding the merits." 396 U. S. at 166.

The Court analogized to situations such as the instant case, where new rates have been filed, stating:

> "When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C. § 15(7). Where the Commission finds the proposed rates lawful, its order reads: '[T]he investigation proceedings [are] discontinued.' * * * *Such orders are reviewable* * * *.*" (396 U. S. at 166, fn., emphasis added.)

The railroads in their briefs in the course of this appeal have failed to distinguish their posture here from the position described in *City of Chicago*. Instead they have contented themselves with merely stating that orders of the Commission in general revenue proceedings are unreviewable because of the "circumstances" (p. 14, Motion to Affirm) surrounding them. However, neither the Interstate Commerce Act nor the Administrative Procedure Act lists any relevant "circumstances" which would authorize an exception here from the availability of judicial review of this ICC action.

In two companion cases decided March 3, 1970, *Association of Data Processing Service Organizations, Inc.* v. *Camp, Comptroller of the Currency* (397 U. S. 150), and *Barlow* v. *Collins, Executive Director, Alabama Agricultural Stabilization and Conservation Service* (397 U. S. 159), this Court held agency actions judicially reviewable, because, as in the case at bar, the petitioners were aggrieved by agency action and the relevant statutory provisions contain no language to rebut the presumption of reviewability.

In the *Data Processing* case, the petitioners challenged a ruling* of the Comptroller of the Currency (applicable only to banks) that national banks could make data processing services available to other banks and to bank customers, alleging, *inter alia*, that competition by national banks in the business of providing data processing services might result in some future loss of profits to the petitioner. The Court held that such action of the Comptroller was review-

* It is noted that the ruling was clearly permissive in nature, but was nevertheless the subject of judicial review. The railroads and the ICC claimed below that the ICC's order herein was not judicially reviewable, because of its permissive nature. We note that the railroads in their Motion to Affirm herein (p. 14) have abandoned that argument.

able under the terms of the Administrative Procedure Act, since it could find no evidence that any statute "preclude[d] judicial review", the test of § 701(a) of the Administrative Procedure Act, as that statute has been interpreted by the Court in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967). The Court held that there "is no presumption against judicial review and in favor of administrative absolutism [citing *Abbott*] unless that purpose is fairly discernible in the statutory scheme" (387 U. S. at 157). The Court could find no such evidence in the statutory scheme of the "relevant statutes" (the Bank Service Corporation Act or the National Bank Act), and held that petitioners, as competitors of national banks, were within the class of "aggrieved" persons who are entitled to judicial review of agency action under § 702 of the Administrative Procedure Act.*

In the companion *Barlow* case, tenant farmers challenged an amended regulation of the Secretary of Agriculture which made it possible for landowners to demand the assignment to them of money made available under the Federal "Upland Cotton Program" as a condition to obtaining a lease to work the land. This Court held that the petitioning tenant farmers had the "personal stake and interest" required by Article III of the Constitution, and were clearly within the zone of interests protected by the Food and Agriculture Act of 1965. The Court also found that judicial review of the Secretary's action was not precluded by the relevant statutes. The Court again

* Here, the railroads argued below that judicial review should be denied plaintiffs because they had suffered no "legal wrong". (See C.A. p. 81a-84a.) The Court in *Data Processing* clearly held that whether a legal wrong had been suffered or a legal interest invaded was a question going to the merits of the action and should not be determinative of the threshold questions of jurisdiction and standing to sue (397 U. S. at 158).

referred to its language in *Abbott Laboratories* (387 U. S. 136, 141) that it is "'only upon a showing of "clear and convincing evidence" of a contrary legislative intent' that the courts should restrict access to judicial review" (397 U. S. 159 at 167).

As noted above, the Utility Appellants are clearly "persons aggrieved" since they were made subject by ICC order to a liability to pay some additional $1.5 million annually in increased freight charges, which the ICC gave permission to the railroads to make effective after a hearing in which no evidence was adduced as to whether such rates would be "just and reasonable" as required by 49 U.S.C. § 1(5) and 49 U.S.C. § 15(7) (pp. A-8 and A-13, *infra*). Similarly, State Appellants are clearly "aggrieved" because the ICC's order places the agricultural products of the northeastern states at a disadvantage compared with those of the southeastern states.

There is no "clear and convincing evidence" that judicial review is precluded here. Indeed, as noted above, the applicable statutes provide that three-judge courts have jurisdiction of any suit seeking to enjoin an order of the Interstate Commerce Commission.

In *City of Chicago*, the Court relied on its earlier decision in *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125 (1939), which was an appeal from a final decree by a three-judge district court dismissing on the merits a bill to review an order of the Federal Communications Commission, which order had found Rochester subject to FCC jurisdiction. Justice Frankfurter, writing for the Court, found that the FCC order was reviewable although such order did not compel any action by Rochester, because it:

> "was not a mere abstract declaration regarding the status of the Rochester under the Communications Act [footnote omitted], nor was it a stage in an

incomplete process of administrative adjudication." (307 U. S. 125, 143.)

The judgment rendered was a "final and indisputable basis of action as between the Commission and the defendant" (307 U. S. 125, 143). In the instant case, the ICC found that the general level of rates was just and reasonable and would not adversely affect the movement of traffic, findings which were the "final and indisputable basis" of its action in permitting the railroads to collect the increased rates.

Justice Frankfurter noted that such an order as that of the FCC in *Rochester Telephone* was reviewable to determine "questions affecting constitutional power, statutory authority and the basic prerequisites of proof" (307 U. S. 125, 140). Those are the very questions these Appellants sought to have reviewed below in the three-judge District Court.

The scope of reviewability set in the *Rochester* case was expanded by two other cases also decided prior to the *City of Chicago, Barlow* and *Data Processing* decisions, *supra*. These cases also arose under the Urgent Deficiencies Act. They are *Columbia Broadcasting System* v. *U. S.* 316 U. S. 407 (1942), and *Frozen Food Express* v. *U. S.*, 351 U. S. 40 (1956).

In the *Columbia Broadcasting System* case, the Federal Communications Commission had issued a rule providing for the non-renewal or revocation of licenses of stations whose contracts with a broadcasting network contained certain proscribed conditions. The Court held the FCC regulation to be a reviewable "order", even though it did not formally apply to CBS, and no contracts or licenses had been cancelled. In deciding that review was possible despite this seeming lack of finality, the Court said:

"Here the Commission exercised its rule-making power by adopting regulations whose operation is not

made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it." (316 U. S. 407, 420.)

In *Frozen Food Express,* the express company, a motor carrier not a party to the prior administrative proceeding, instituted a suit in a statutory three-judge court to have the findings and order of the Interstate Commerce Commission enjoined and set aside. The findings related only to the status of certain agricultural commodities which Frozen Food often carried. The order would have made it necessary for Frozen Food to obtain a certificate of public convenience and necessity, where before the order its carriage was exempt. The mere possibility that the Commission might issue a cease-and-desist order (even though that order itself would be reviewable) and the legal consequences thereof were held by the Court to make this determination a reviewable order.

III.

Relief Sought By Appellants is Unavailable in a Section 13 Proceeding

The railroads and the ICC argue that Appellants' protection of their interests is provided through the privilege of filing a Section 13 complaint. This, they assert, is "clear and convincing evidence" of non-reviewability of the instant order of the ICC. Their argument includes several

fundamental errors. In the first place, Section 13 provides that:

> "Any person * * * complaining of anything done or omitted to be done *by any common carrier* subject to the provisions of this chapter * * * may apply to [the] Commission * * * whereupon a statement of the complaint * * * shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint * * *." (Italics added.)

It is thus clear that a Section 13 proceeding seeks redress from an unlawful act of a *carrier*. Appellants are seeking redress from the *Commission*, not from any carrier.

Thus it is patently fallacious to argue that the statute by reason of Section 13 constitutes "clear and convincing evidence" that Congress intended to deny judicial review to Appellants. Indeed, in the one action where shippers attempted under Section 13 to obtain review of the Commission's order in a general revenue proceeding, the Commission squarely held that they had chosen the wrong route:

> "The complainant introduced in evidence a series of exhibits containing certified copies of the record in the Ex Parte No. 175 proceeding bearing upon the level of the water-transportation costs as between the New England and the New York ports. In this manner, it purports to attack our order in that proceeding. Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but *whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding.*" (*Koppers Co., Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 387 (1958); italics added.)

It is submitted that the decision of the Commission in the *Koppers* case was correct. Whether or not its prior "permissive order" permitting the rate increases to be put into effect was procedurally proper and supported by substantial evidence, it was unquestionably within the ICC's jurisdiction to issue such order. Therefore, the action of the carrier in increasing its rates pursuant to the order was not one which could be complained of by a collateral attack on the general order in a Section 13 proceeding. All that the shippers can do under Section 13 is to attack the justness and reasonableness of specific rates permitted to be put into effect by the general order. A Section 13 proceeding would not involve any review of the evidence or procedures leading to the prior general order.

For example, despite the fact that it is well established that the Commission is the guardian of the public interest in these general revenue proceedings, the Commission itself took no part in the proceedings other than to sit by "merely call[ing] balls and strikes" between the necessarily unmatched advocates before it. Motions were made to join the Commission's Bureau of Accounts, which motions were denied, and no bureau, section member, counsel or other employee of the ICC was a party to the proceeding before it. It is thus clear that the public interest was accorded no protection whatsoever by the Commission in the Ex Parte 259 hearings.

The Commission has only recently been exhorted by the Supreme Court of the United States to better protect the public interest. *Baltimore & Ohio Railroad Co.* v. *U. S. et al.*, 386 U. S. 372 at 436 (1967), Brennan, J., concurring opinion:

> "Ultimately, however, the reason reliance upon the estimates of railroads of their own best interests is

> objectionable is simply that the *best interests* of the *railroads are not necessarily consistent with the public interests, and it is the latter which the Commission is directed to advance.* . . . The commendable industrial statesmanship demonstrated by the railroads on many occasions in these recent proceedings only serves, because of the cohesion this demonstrates . . . to aggravate the danger that 'grows out of the tendency of these giant corporations to compromise their own differences at the expense of the unorganized public', 2 Davis *op. cit. supra* [Admin. L.] n. 21, at 378. The regulatory agency must be the bulwark against such compromise. It is 'a requisite for administrative viability that "[t]he outlook of the Commission and its powers must be greater than the interest of the railroads, or of that which may affect those interests.' *I.C.C.* v. *Chicago, R.I. & P.R. Co.*, 218 U. S., 88, 103." (Footnote omitted, emphasis supplied.)

In that same concurring opinion, Justice Brennan also said (at 429):

> "The ICC is pre-eminently an agency 'directly and immediately concerned with the outcome of virtually all proceedings conducted before it. It is not intended to be a passive arbiter but the "guardian of the general public interest," with a duty to see that this interest is at all times effectively protected.' H.R. Doc. No. 678, Practices and Procedures of Governmental Control of Transportation, 78th Cong., 2d Sess., p. 53 (1944); see *Southern Class Rate Investigation*, 100 I.C.C. 513, 603. It is empowered to investigate and gather evidence beyond that presented by the parties where exercise of that power will advance the determination of what best

> serves the public interest.* "To the same end, the agency has wide latitude in fashioning procedures, and a broad power to condition its approval of proposals. In other words, the ICC is not the prisoner of 'the parties' submissions.**'"

Interstate Commerce Commissioner Aitchison's statements concerning the obligations of administrative agencies to themselves develop an adequate record, as set forth in the Senate Subcommittee Hearings on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess., Apr. 29, 1941, 412 at 465-6, have been quoted with approval by a Federal Court of Appeals and by a Federal District Court:

> "They [administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in. . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . ."

* "'A regulatory body such as the Interstate Commerce Commission cannot properly discharge its duty if it remains ignorant of relevant facts simply because they were not introduced in evidence. The Commission should itself supply deficiencies in the record. It should bring to light material which the parties have either overlooked or have willfully failed to call to its attention. It should aid those parties who through lack of resources are unable adequately to present their cases. It should make full use of the expert knowledge of commissioners and staff, and of the mass of transportation information that it has accumulated through the years.' H.R. Doc. No. 678, *supra*, p. 70. See *Eastern-Central Motor Carriers Assn. v. United States*, 321 U.S. 194, 208-210, 212, 216-217." (Footnote in original).

** Footnote omitted.

Isbrandtsen Co. v. *U. S.*, 96 F. Supp. 883 at 892 (SD.N.Y. 1951, affd. 342 U. S. 950, 1952); and see *Scenic Hudson Preservation Conf.* v. *F.P.C.*, 354 F. 2d 608 at 621 (2d Cir. 1965), *cert. den.* 384 U. S. 941 (1966).

In the latter case, the FPC staff had taken an active part in the hearings before the examiner, had presented witnesses of its own, cross-examined applicant's and intervenors' witnesses, and submitted briefs and exceptions to the examiner's decision, but the FPC was nevertheless reversed by the court for not testing and supplementing evidence presented by the parties adequately to protect the public interest.

On this same point of the Commission's affirmative duty, in *Aberdeen & Rockfish R. Co.* v. *U. S.*, 270 F. Supp. 695 (E.D. La. (1967), affd. as modified, 393 U. S. 87 (1968)), the court quoted with approval the language of another District Court as follows:

> "'The [Interstate Commerce] Commission is not a passive arbitrator of disputes between carriers. It is the instrument chosen by Congress to regulate interstate commerce in the public interest. When carriers fail to produce satisfactory evidence, the Commission may require them to produce additional and more satisfactory evidence. It may make its own investigation. It may consult with "other interrested and presumably better informed agencies of the Government as to particular question [*sic*]." Cantlay & Tanzola, Inc. *v.* United States, [D. C.,] 115 F. Supp. [72,] 81. However, the record does not disclose that any of those courses was followed in this case. *The fate of our national transportation system should not depend upon evidence either offered or withheld by competing carriers.*'" (Emphasis added by the court.) 270 F. Supp. 695, 711.

> "There is no doubt as to the Commission's statutory powers to require the development of adequate and comparable cost data. Section 12(1) of the Interstate Commerce Act authorizes the Commission to 'obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of the [Act]' (49 U.S.C. §12(1)). Section 20(1) of the Act expressly grants the Commission the power 'to require . . . special reports from carriers' and to require the carriers to provide 'full, true and correct answers to all questions upon which the Commission may deem information to be necessary' (49 U.S.C. §20(1)). This power was sustained in *Baltimore & O. R. Co.* v. *ICC*, 221 U. S. 612, 621 (1911)." *Id.* at 712.

The failure of the Commission to adequately protect the public interest in *Ex Parte 259* is clearly not reviewable under a Section 13 proceeding.

To fully appreciate the difference between judicial review of the order below and filing a complaint in a Section 13 proceeding, it should be borne in mind that Section 15(7) of the Interstate Commerce Act (p. A-13, *infra*), requires that at any hearing involving a change in rate, the burden of proof be upon the carrier. Similarly, §556(d) (p. A-5, *infra*) of the Administrative Procedure Act requires that the burden of proof be sustained by the proponent of an order. Should Appellants be remanded to a Section 13 proceeding, the burden of proof, which both the relevant statutes placed upon the railroads in the proceeding below, would be shifted to shippers and their state representatives. In other words, although on the facts deemed admitted, the railroads have failed to sustain their statutory burden of proof that the proposed rates would be just and reasonable, they and the Commission now contend that the shippers' right to review is limited to bring-

ing a proceeding in which the shippers have the burden of showing that the increased rates are *un*just.

There is no provision in the applicable statutes that general revenue proceedings are exempt from the statute (§15(7)) requiring carriers to prove that the proposed increases will result in just and reasonable rates which will not adversely affect the movement of traffic. When the railroads failed to produce any evidence on these issues, Appellants requested, at various times throughout the proceedings, that the presentation of such evidence be compelled (¶12, Utility Appellants' complaint, C.A. p. 8a). All such requests were denied by the ICC's presiding examiners.

Thus, there is no reason to believe that if Appellants filed a Section 13 complaint, the cost data necessary to make out their *prima facie* case would be available to them. This evidence is in the exclusive possession of the railroads and is filed on a confidential basis with the Commission's Bureau of Accounts. Therefore, the shift in the burden of proof from the carriers to the Appellants which occurs in a Section 13 proceeding is of great importance. It is highly doubtful that Appellants could present a *prima facie* case without such relevant evidence.

Moreover, in any such proceeding, Appellants would be forced to prove that the findings underlying the Commission's January 9th order were in error—a most difficult task indeed if the Commission should be first assured in this proceeding that that order is immune from judicial review.*

*The orders reviewed by this Court in the *CBS* and *Frozen Food* cases, *supra*, were general orders. In each of those cases, Appellants could have sought a determination by the agency involved as to the specific applicability of the general order to them. Despite that fact, however, this Court held that review of the general orders was available.

In a recent decision, the Court of Appeals for the District of Columbia, Burger, J., writing the opinion, admonished the Federal Communications Commission in very strong terms that it had a duty to see that the burden of proof was borne by the proper party and sustained by it. See *United Church of Christ v. FCC*, 1965 *et seq.*, [Federal] *C.C.H.* Util. L. Rep. ¶11069 (D.C. Cir. June 20, 1969).

IV.

The *Algoma* Line of Cases is Not Controlling

The railroads and the ICC have placed great stress herein on three cases referred to during the course of these proceedings as the "Algoma" line.* In *Algoma Coal and Coke* and two subsequent cases, plaintiffs were shippers seeking judicial review of their specific rates, approved in a general revenue proceeding. The courts refused such review, properly regarding rate-making as an exclusive Commission function. The court below in the instant case also relied upon the *Algoma* doctrine in reaching its decision.

Whether or not the *Algoma* doctrine is correct, it is applicable only if a complaint seeks to review the justness and reasonableness of specific rates. However, Appellants' complaints here do not relate to specific rates—but to the propriety of an ICC general revenue order lacking the statutory prerequisites. They challenge the legality of that order and of the proceedings before the Commission. They assert that nobody, including the Commission, on the evidence presented to it, could decide whether any or all

* *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va., 1935); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa., 1955), and *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla., 1956), *aff'd. per curiam*, 352 U. S. 1021 (1957).

rates should be increased. Appellants allege that all the increased rates are illegal because the Commission has a statutory preliminary duty to find, based on proper evidence presented by the carriers, that rates which it permits to become effective are just and reasonable, and will not result in diversion of traffic.

The dissenting opinion of Circuit Court Judge J. Skelly Wright in the *Alabama* case (No. 106, consolidated with the instant case for briefing and argument), supports the contentions both of Appellants in that case and in the instant case. Judge Wright found that "plaintiffs here are not seeking to challenge the appropriateness of any rate or combination of rates. Instead, they wish to challenge the propriety of a Commission order which allowed the rates generally to be raised by the carriers." (C.A. p. 217a.) The order of the Commission, Judge Wright maintained, "must be based on substantial evidence" (C.A. p. 217a). Citing the Urgent Deficiencies Act, Judge Wright went on to give as his opinion that the order was "of course" judicially reviewable, and, furthermore, "now" ripe for review (C.A. p. 217a).

Judge Wright concluded that both *Algoma* and *Florida Citrus* sanctioned this "threshold" type of review, and a close examination of those cases supports Judge Wright's conclusion. In both, the reviewing courts examined the evidence to determine if the Commission had acted properly. Neither of the courts below in No. 78 or No. 106 has looked into the merits of the case before it; they have merely dismissed both actions on the grounds that the Commission's order is not judicially reviewable.

V.

Additional Arguments Against Reviewability are Without Substance

A. "Legality" of Approved Rates

The railroads in their Motion to Affirm argued that the Commission's order "merely found in a preliminary way that an overall increase in rates is not unreasonably large", and that the Commission did not find that "any particular rate as so increased is necessarily lawful" (Motion to Affirm, p. 5). Similar language is found throughout the Motion (see, e.g., pp. 8, 9 and 15).

This is not an accurate statement. The Commission found the proposed increases to be "just and reasonable" (332 ICC at 791, C.A. p. 391a); that the increased rates "will not exceed a maximum reasonable level" (332 ICC at 792, C.A. p. 393a), and that they "will have no undue adverse effect on the movement of traffic." The Commission's order complies on its face with the statutory requirements. Nothing further remains to be done to meet the test for finality of administrative action. The increased rates are in effect pursuant to Commission authorization. A shipper attacking any specific increased rate has the burden of proof to show not only that the rate is unjust and unreasonable, but that the Commission's findings on that issue are in error. There is nothing "preliminary" about the Commission's order—entered after an investigation and suspension; it is a final order establishing nationwide rates.

B. The Railroads' Need for Immediate Relief

The Department of Justice, in its memorandum urging this Court to take jurisdiction of these appeals pointed out that "serious problems would be presented to the

railroads, particularly those in precarious financial condition, if across-the-board interlocutory relief were given against rate increases as an incident of reviewability. A temporary restraining order or preliminary injunction staying a Commission general revenue order ultimately held valid could result in the loss of large amounts of urgently needed rail revenues." The Department has thus focused on a problem which, while not directly before the Court because of the nature of the decisions below, may be considered by the Court in deciding the narrow legal issue of reviewability.

The problem may not be as severe as presented.* Increased rates do not, *ipso facto*, increase the railroads' revenues. Only traffic moving at increased rates increases revenues. When the railroads allege that permitting certain rate hikes will result in increased revenues of, say, $466 million (as they did in Ex Parte 259), and the Commission permits rates to go into effect to produce that amount of revenue, a fundamental assumption underlies those statements: that the increased rates will not cause any diversion of traffic. In other words, increased rates, *applicable to present volumes of traffic*, will produce the increased revenue. However, as with these plaintiffs, the increased rates did not produce increased revenues because substantial traffic was diverted from the railroads by the increases. In fact, the increased rates produced an ultimate decrease in revenues and a decrease in contribution over the railroads' out-of-pocket costs. This proves that the Commission's present policy of permitting the increases which the railroads seek, on a mere showing of alleged revenue need, is not only illegal, because not authorized by statute, but illogical and ineffective in achieving the desired end. Therefore, it is the position of these plaintiffs that

* Virtually all regulated industries are subject to this purported problem; few have found it to be a real danger to their financial stability.

properly conducted proceedings before the Commission, which may consume more time than the present type of general revenue proceedings, will not themselves constitute a real danger to the railroads. Instead, based upon proper evidence, the Commission can permit increased rates on that traffic which will not thereby be diverted from the railroads.

Conclusion

For all of the above reasons, it is respectfully submitted that the opinion of the lower court should be reversed and the case should be remanded to it for trial on the merits.

Respectfully submitted,

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APPENDIX

Statutes Involved

Judicial Code

28 U.S.C. §1253

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. §1336

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U.S.C. §2101(b)

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

28 U.S.C. §2284

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

28 U.S.C. §2321

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and

proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U.S.C. §2322

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U.S.C. §2323

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. §2324

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U.S.C. §2325

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Government. Organization and Employees—The Agencies Generally: Administrative Procedure

5 U.S.C. §556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications

for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. §556(e)

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Judicial Review

5 U.S.C. §701(a)

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. §702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §703

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inade-

quacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. §704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

Interstate Commerce Act

49 U.S.C. §1(5)

Just and reasonable charges. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

49 U.S.C. §3(1)

(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause

any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C. §13

(1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall

appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

(3) Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is author-

ized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of

carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden: *Provided*, That upon the filing of any petition authorized by the provisions of paragraph (3) of this section to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid into the lawfulness of such rate, fare, charge, classification, regulation, or practice (whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of any proceeding relating thereto) and shall give special expedition to the hearing and decision therein. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

49 U.S.C. §15(1)

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons

or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

49 U.S.C. §15(7)

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice,

to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just

and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

49 U.S.C. §15a (1) and (2)

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

49 U.S.C. §17(3)

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpenas. A majority of the Commission, of a division, or of a board

shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

49 U.S.C. §17(9)

(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

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No. 106

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

ALABAMA POWER COMPANY, et al.,

Appellants,

v.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

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BRIEF ON THE MERITS OF AMICUS CURIAE THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

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---

BRIEF ON THE MERITS OF AMICUS CURIAE THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

OPINION BELOW

The opinion of the United States District Court for the District of Columbia (App. 213-219) is not yet officially reported. The initial and final reports of the Interstate Commerce Commission are reported at 332 ICC 590 and 332 ICC 714 (App. 284-397).

JURISDICTION

The decision of the three judge District Court dismissing for lack of jurisdiction the complaint of shippers seeking judicial review of the Reports and Orders of the Interstate Commerce Commission was entered on December 4, 1970. After the filing of the Jurisdictional Statement, a Brief of this amicus curiae, the National Industrial Traffic League, in support of the jurisdictional statement and a motion to affirm from the railroad intervenors, this Court noted probable jurisdiction on May 18, 1970 and ordered the case consolidated with No. 78 ., (October 1969 term No. 1083) *Atlantic City Electric Co. v. United States.* The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b). *City of Chicago v. United States*, 396 U.S. 162, 24 L.Ed.2d 340 (1969); *American Trucking Association, Inc. v. Atchison, T. & S.F. Ry.*, 387 U.S. 398 (1967); *United States v. Drum*, 368 U.S. 370 (1962); *Frozen Food Express, Inc. v. United States*, 351 U.S. 40 (1956).

QUESTION PRESENTED

As stated by the appellants, the question presented is: May shippers, both individually and as a class, be denied judicial review of Commission orders, entered after hearing and investigation, insofar as they authorize across-the-board increases in the level of railroad freight rates and charges, and modify outstanding rate orders and grant Fourth Section relief to the extent necessary to permit the increases to become effective?

STATUTES INVOLVED

Sections 551, 702 and 704 of Title 5, United States Code, The Administrative Procedure Act; Section 1336 of Title 28, United States Code; and Sections 13, 15(1), 15(7) and 15a(2) of the Interstate Commerce Act, as amended, are set forth in Appendix D to the appellants' Jurisdictional Statement.

STATEMENT OF THE CASE

The proceeding in the court below was instituted by several groups of shippers to enjoin, annul and set aside certain rate increase orders of the Interstate Commerce Commission entered November 26, 1968 and January 9, 1969 in Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 ICC 714. These orders permit the railroads of the United States to effect a general increase in their freight rates and charges which averaged about 5 percent, but differed as between commodities between 3 percent and 10 percent, for a total increase of approximately $450 million per annum.

The National Industrial Traffic League, *amicus curiae* herein, was a protestant and participated actively throughout the proceedings before the Interstate Commerce Commission. It presented evidence through two separate verified statements of a Transportation Economist. However, its participation related only to the general issues as to the overall revenue need and the justness and reasonableness of the overall increase. Its active participation was basically in the sub-number 2 proceeding designated by the Commission as "Railroad Cost and Revenue Needs." The issues in Sub-numbers 3 - 11 dealt with the increases as they applied on particular commodities. As a national association of shippers, chambers of commerce and boards of trade located throughout the country and using all modes of transportation, including railroads, and with interests relating to all commodities, the League did not participate in the sub-numbered proceedings dealing with specific commodity application of the general increase in issue

The three-judge statutory District Court by a two-to-one vote (Circuit Judge J. Skelly Wright, dissenting) dismissed the complaint on the ground that "it lacks jurisdiction to review the questioned Commission orders," citing the 1935 decision in *Algoma Coal and Coke Co. v. United States*, 11 F. Supp. 487 (E.D. Va.), as controlling. (App. 215.)

SUMMARY OF ARGUMENT

Judicial review of general rate increases is not expressly precluded. Review of agency decisions are generally subject to judicial review, particularly where they have such a broad and immediate effect as an average five percent increase in a $10 billion rate structure. The decision of the Court below denying judicial review is in conflict with the broad review generally permitted of agency decisions including those of the Interstate Commerce Commission. Judicial review should be available both as to the overall amount of increase as well as to the general manner by which it is to be apportuned to different traffic.

ARGUMENT

I.

Judicial Review of the Commission's Action Is Not Precluded

There is no express statutory exclusion of review from a decision and order of the Interstate Commerce Commission including the decision and order in this proceeding, authorizing and approving a general rate increase for railroads. Nothing to that effect was cited by the Court below or by the railroads in urging a lack of jurisdiction.

The statutes provide for judicial review. Jurisdiction is conferred on the District Courts to set aside, annul, enjoin, etc., orders of the Interstate Commerce Commission, specifically Section 1336 of Title 28 of the United States Code. 28 USCA §1336. The Interstate Commerce Act in Section 17(9) specifically contemplates "a suit to enforce, enjoin, suspend or set aside" a decision, order, or requirement, in whole or in part, of the Commission and further contemplates that such a suit may be brought in a court of the United States under applicable provisions of law. 49 USCA §17(9). Section 17 of the Interstate Commerce Act in all of its paragraphs deals generally with the questions of Commission procedure, the delegation of duties, separations into divisions, the handling of proceedings, including the submission of written reports

with respect to matters involving the taking of testimony of public hearings, rehearings, reargurnents and reconsiderations, stays pending disposition of applications for reconsideration, etc., USCA §17(9). These general procedures including the provision for court appeal set forth in Section 17(9) follow in sequence the provisions of Section 15 setting forth the Commission's investigation procedures. Section 17 follows and applies equally to the alternative proceedings before the Commission instituted as investigations, under Section 15 of the Act, the procedure in this case.[1]

The Administrative Procedure Act specifically provides that agency action, including an agency such as the Interstate Commerce Commission, is subject to court review, 5 USCA §§ 702, 704. The Administrative Procedure Act has been described as containing "generous review provisions" which "must be given a 'hospitable' interpretation" so that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 139, 140. Cf. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150; *Barlow v. Collins*, 397 U.S. 159.

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[1] The Commission's initial report, 332 I.C.C. 590, 595 (App. 256-7), indicates that the investigation was being partially conducted under the provisions of Section 13 of the Act. 49 USCA § 13(3).

II.

The Decision of the Court Below Denying Judicial Review Is in Conflict with Review Generally Granted Decisions of Administrative Agencies Including Those of the Interstate Commerce Commission

Only persuasive reasons should prevent judicial review. This Court discussing review of I.C.C. decisions, has recently stated in *City of Chicago v. United States*, 396 U.S. 162, 24 L.Ed. 340, 343 that:

> ". . . We start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose."

A noted author has expressed the same concept with the proposition that "in our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination on its validity." Jaffe, "Judicial Control of Administrative Action." Little, Brown & Company, Boston, 1965, page 336.

This Court recently re-emphasized these principles strongly favoring judicial review in *Association of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 25 L.Ed. 2d 184; and *Barlow v. Collins*, 397 U.S. 159, 25 L.Ed.2d 192.

The decision of the Court below is in conflict with cases, many from the same circuit, reviewing closely analagous decisions from other regulatory agencies. Parties before other agencies have been able to obtain judicial review of decisions from their respective agencies dealing with matters quite comparable to the general rail increase which was the subject matter of the complaint below. General rate increases by power companies or natural gas companies regulated by the Federal Power Commission have been subjected to judicial review. *Lynchburg Gas Company v. FPC*, 336 F. 2d 942 (D.C. Cir.,

1964); *City of Pittsburgh v. FPC*, 237 F. 2d 741 (1956). General rate investigation decisions of the Federal Communication Commission are reviewable. *Wilson & Co., Inc. v. United States*, 335 F. 2d 788 (7th Cir., 1964) *cert. denied* 380 U.S. 951; *American Trucking Association, Inc. v. FCC*, 377 F. 2d 121 (D.C. Cir., 1966) *cert. denied*, 386 U.S. 943. Civil Aeronautics Board decisions involving general rate investigations are subject to judicial review. *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466, 476 (5th Cir., 1967) *cert. denied*, 390 U.S. 920; *Moss v. CAB*, ___ F.2d ___ (No. 23,627 decided July 9, 1970, U.S. App. D.C.). Federal Maritime decisions dealing with general rate increases are subject to judicial review. *Government of Guam v. FMC*, 329 F.2d 251 (D.C. Cir., 1964); *Puerto Rico v. FMC*, 288 F.2d 348 (D.C. Cir. 1961).

The decision of the Court below conflicts with decisions providing judicial review of other I.C.C. decisions. Commission decisions entered in rate investigation proceedings have consistently been subjected to judicial review. *Central and Southern Motor Freight Tariff Assn. Inc., v. United States*, ___ F.Supp.___, 1969 Federal Carriers Cases No. 82, 107 (N.D. Ga., 1969), reviewing Investigation and Suspension Docket No. M-22165, *Delivery Charges on LTL Shipments To Points in Florida*, 332 I.C.C. 892 (1968); *Ryder Truck Lines, Inc., v. United States*, 308 F.Supp. 341, 1969 Federal Carriers Cases No. 81, 161 (M.D. Fla. 1969), reviewing I. & S. Docket M-21914, *Pickup Charges, Ryder Truck Lines*, 335 I.C.C. 39 (1968) and Docket No. 34915, *Arbitrary Charges on Shipments From Georgia to Florida*, 335 I.C.C. 209 (1960); *Ringsby Truck Lines, Inc. v. United States*, 263 F.Supp. 552 (D. Colo., 1967), appeal dismissed as moot 389 U.S. 576 (1968), reviewing Docket 34662, *Increased Class & Commodity Rates, Transcontinental*, 326 I.C.C. 397 (1966); *Accelerated Transport-Pony Express, Inc., v. United States*, 227 F.Supp. 815 (D. Vt., 1964) aff'd, *per curiam*, 379 U.S. 4 (1964), reviewing Docket 33652, *General Increase - Middle Atlantic and New England Territories*, 319 I.C.C. 168 (1963); *Saginaw Transfer Co. v. United States*, 275 F.Supp. 585

(E.D. Mich., 1967), reviewing Docket No. 33978, *Chemicals In Aggregate Shipments, Midland, Michigan to the East*, 326 I.C.C. 657 (1965).

Declaratory orders of the Commission are reviewable. *Keller Industries, Inc. v. United States*, 304 F.S. 852 (N.D. Fla. 1969); *Pennsylvania RR. v. United States*, 363 U.S. 205 (1963).

The decision below was inconsistent with the judicial review granted in *Boston and Maine Railroad v. United States*, 162 F.Supp. 289, 292, n. 4 (D. Mass., 1958), appeal dismissed, 358 U.S. 68, wherein the court had provided judicial review and remanded a decision of the Commission finding that per diem charges were not in excess of reasonable compensation during the period which they had been in effect and that "the latter charge is not in excess of reasonable compensation for present use."

Ex Parte docket investigations, including general rule-making proceedings, are reviewable. *Northern Freight Lines v. United States*, 304 F.Supp. 536 (N.D. Ga., 1969) reviewing Ex Parte No. 242, *Express Company Terminal Areas*, 332 I.C.C. 91 (1967); *American Trucking Assn. v. Atchison T.&S.F. Ry.*, 387 U.S. 397 (1967) reversing 244 F.Supp. 955 (N.D. Ill., 1966) reviewing Ex Parte 230; *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders*, 322 I.C.C. 301 (1964); Cf *Frozen Food Express v. United States*, 351 U.S. 40 (1956).

The denial of judicial review below is contrary to this Court's very recent decision in *City of Chicago v. United States*, 24 L.Ed.2d 340 (1969), granting judicial review of an ICC order terminating an investigation of a proposed passenger train discontinuance.

III

The Investigation Remedy Was Exhausted: The Commission's Decision Is Ripe For Judicial Review.

The specific administrative remedy involved, i.e. a general investigation of the lawfulness of the total amount of the increase and its general manner of apportionment, has been completed. The Commission's action being attacked in the Court below was an administratively final determination. Hearings had been provided, cross-examination had been completed, briefs had been presented, oral arguments had been heard, a full written report and order had been adopted. No further action by the Commission was required, available, contemplated or possible. Other than under extraordinary rule relief, the Commission's procedures did not permit the filing of any further papers. The Commission's administrative procedures by which parties could challenge the Commission's conclusions as to the lawfulness of the overall increase had been exhausted.[1]

The Commission's report herein dealt with the merits. It should not be said that a Commission's decision that increases should not be allowed is a reviewable decision, while an answer like that here saying the increase shall be allowed is not a reviewable decision. Cf. *City of Chicago v. United States*, 24 L.Ed.2d 340, 344 (1969), where this Court said:

> A decision to investigate indicated that a substantial question exists under the statutory standards. The Commission's report therefore deals with the merits. We cannot say that an answer that discontinuance should not be allowed is agency "action,"

[1] In a Section 13 complaint proceeding challenging the specific application of a general rail increase to particular rates the Commission has stated that "whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." *Koppers Co., Inc. v. Chesapeake & Ohio Ry.*, 303 ICC 383, 387 (1958).

while an answer saying the reverse is agency "inaction." The technical form of the order is irrelevant. In each case the Commission is deciding the merits.

The Commission's decision is in a justiciable form to be considered ripe for review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-9 (1967). This is not an abstract disagreement. The vital interests of the Appellants are affected. The withholding of court consideration works a severe hardship on the appellants as well as other parties to the Commission proceeding. As clearly seen by Judge Wright in his dissent, the alternative complaints are neither reasonable nor feasible, involving as they do a great multiplicity of individual rate cases separately attempting to challenge the correctness of the overall increase. Judicial review of the Commission's decision on the reasonableness of the overall increase and the lawfulness of the general manner of its apportionment should have been provided by the court below.

IV

Algoma Is Not Controlling

The lower court's reliance upon *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487 (E.D. Va., 1935), is misplaced and contrary to the widely recognized right of parties to obtain judicial review of agency action. *Algoma* involved a suit by a limited number of the parties to the case before the Commission to enjoin the Commission's action in approving a general increase only insofar as it applied to the rates on their movements of coal. They did not make an overall attack upon the propriety of the Commission's conclusion or findings with respect thereto relating to the total general increase. *Algoma* incorrectly attempted to make a distinction between rates prescribed and permitted by the ICC. Subsequent cases subjected to judicial review and considered by this Court have involved carrier made rates approved by the Commission yet not prescribed by the Commission. The distinction for the purposes of judicial review was not one that had been recognized prior to

Algoma nor was it one that has been recognized subsequent to *Algoma*. Nor is it clear that the Court in *Algoma* actually rested its conclusion on an alleged lack of jurisdiction to grant judicial review, since it clearly went on to consider at some length the issues raised on the merits relating to: the adequacy of preliminary findings, the Commission's authority and the exercise of its administrative discretion in finding a special case under the Fourth-Section, the lack of a showing that the orders prejudicially affected the plaintiff; and the scope of administrative discretion in deciding whether or not to suspend rates.

With respect to the jurisdictional conclusion, if that was the basis of *Algoma*—a position not fully supported by the decision itself, the court in *Algoma* cited no prior cases by this Court nor any statute precluding judicial review of the Commission's decision. Its reliance upon *Birmingham Slag Co. v. United States*, 11 F.Supp. 486 (M.D. Ala., 1935) and *Pitzer Transfer Corp. v. Norfolk & Western Ry. Co.*, 11 F.Supp. 436 (D. Md. 1935), is neither clear nor properly placed. *Birmingham Slag* is a case in which an injunction seeking to restrain "certain named carrier defendants from acting in pursuance of certain orders of the ICC" and thus was an attempt to have the Court act in suspending the rates as opposed to a suit to enjoin, annul, or set aside a Commission determination. *Pitzer* was totally inapposite since it involved a suit by a shipper to enforce a Commission order determining that the rate paid was unreasonable and excessive and ordering reparation. *Algoma* is premised on the failure of the Commission to suspend the rates, "a matter within the administrative discretion of Commission, not now reviewable in the courts." 11 F.Supp. 487 at 495. This basis of the *Algoma* decision is consistent with subsequent decisions in which the courts have been held to lack jurisdiction to review a discretionary withholding by the Commission of its power to suspend. *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963), and cases cited therein.

The Court in *Algoma* emphasized that granting relief to the plaintiff therein with respect only to the coal rates in issue in that case would have created a discriminatory situation. 311 F. Supp. at 496. But this is not the situation raised in the case below where no specific application was attacked but the general increase as a whole was placed in issue.

The decision of the Court below and *Algoma* upon which it relies have both failed to make the analysis required by the Administrative Procedure Act, 5 U.S.C. § 701(a), as to whether the statutes precluded judicial review or the agency action was committed to agency discretion by law. No attempt was made to analyze the essential situation to determine whether or not the presumptions in favor of review contemplated by the generous review provisions of the Administrative Procedure Act were overcome.

CONCLUSION

In view of the direct conflict between the decision of the court below and the principle in this Court's recent decisions in the cases of *City of Chicago v. United States*, 24 L.Ed.2d 340 (1969); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); and *Barlow v. Collins*, 397 U.S. 159 (1970), it appears appropriate for the Court to reverse the decision below and direct a consideration of the case on the merits below.

Respectfully submitted,

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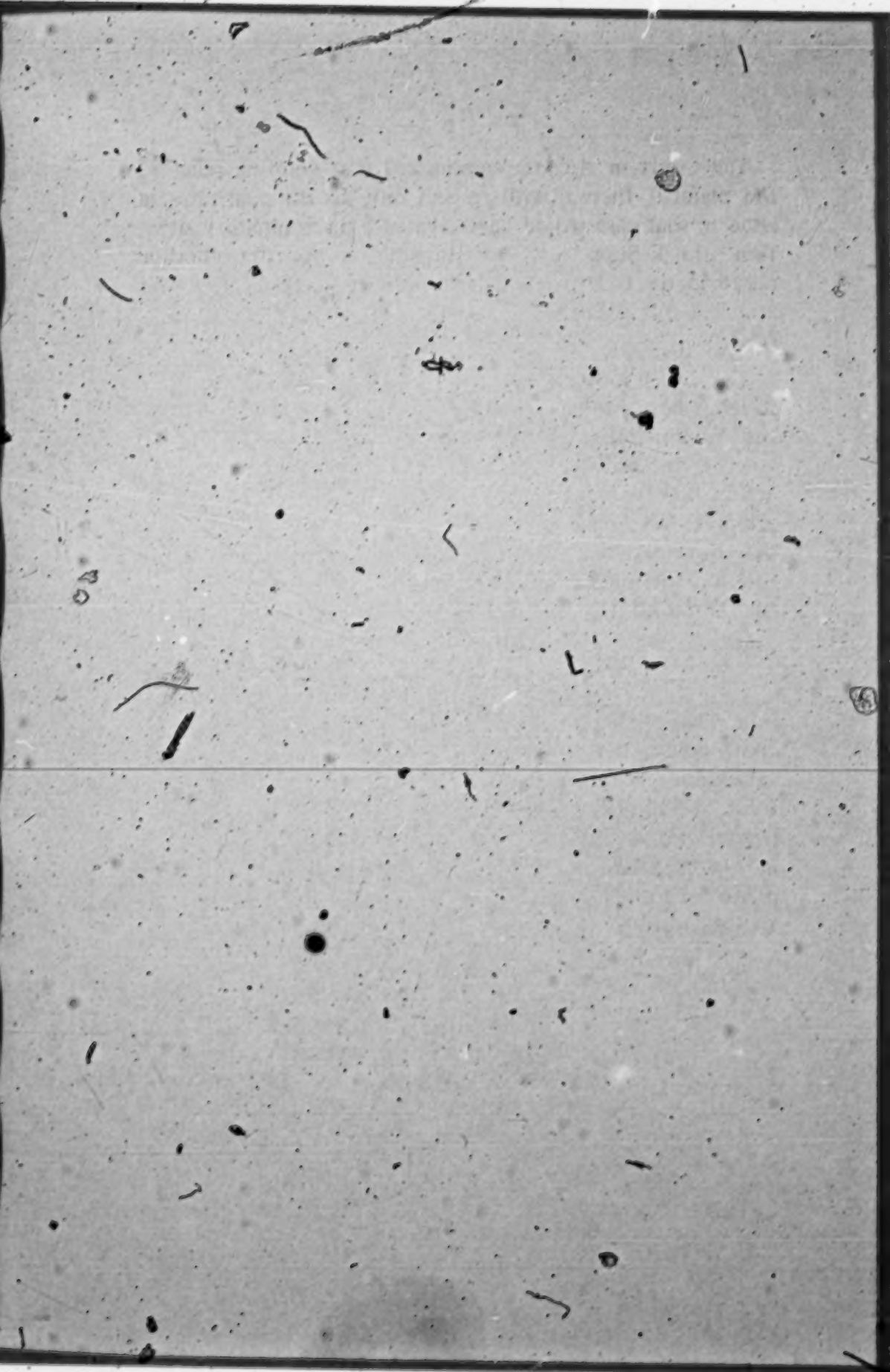

Nos. 78 and 106

In the Supreme Court of the United States

OCTOBER TERM, 1970

ATLANTIC CITY ELECTRIC COMPANY, ET AL.,
APPELLANTS,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ALABAMA POWER COMPANY, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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No. 78

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ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES, THE SECRETARY OF AGRICULTURE, AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court in No. 78 (App. 153a) is reported at 306 F. Supp. 338. The opinion of

the district court in No. 106 (App. 213a) is unreported. The Interstate Commerce Commission's interim decision (App. 248a) is published at 332 I.C.C. 590, and its final order (App. 281a) is published at 332 I.C.C. 714.

JURISDICTION

The judgment of the three-judge district court in No. 78 was entered on October 28, 1969 (App. 165a), and appellants filed a notice of appeal on December 18, 1969 (App. 166a). The judgment of the three-judge court in No. 106 was entered on December 18, 1969 (App. 220a), and appellants filed a notice of appeal on February 4, 1970 (App. 221a). Probable jurisdiction was noted in each case, and the appeals were consolidated on May 18, 1970. Jurisdiction to review the district courts' judgments is conferred by 28 U.S.C. 1253. *City of Chicago* v. *United States*, 396 U.S. 162.

QUESTION PRESENTED

Whether, and if so to what extent, direct judicial review may be had of Interstate Commerce Commission orders authorizing a general increase in freight rates on the basis of findings, *inter alia*, as to railroad costs and revenue needs and as to the reasonableness of the general rate level.

STATUTES INVOLVED

There are set forth in the Appendix to this brief pertinent portions of the Administrative Procedure Act (5 U.S.C. (Supp. IV) 551(13), 701(a), 701(b)

(2), 702, 704, 705), of the provisions of the Judicial Code relating to review of Interstate Commerce Commission orders (28 U.S.C. 1336(a), 2324, 2325, 2284 (3)), and of the Interstate Commerce Act (49 U.S.C. 13(1), 15(1), 15(7), 15a(1) and (2)).

STATEMENT

These consolidated cases are appeals from judgments of three-judge district courts which dismissed appellants' suits to enjoin and set aside a set of orders of the Interstate Commerce Commission authorizing a general increase in rail freight rates.

On March 7, 1968, the railroad respondents, substantially all of the nation's Class I railroads, jointly filed with the Commission a "Petition for Orders Permitting the Filing of Increased Freight Rates and Charges and for the Relief Necessary to the Assessment of Such Charges" (App. 226). With technical refinements that we shall discuss shortly, the Petition basically asked the Commission to take action so as, "following the receipt and consideration of evidence in the form of verified statements, to permit the actual charging of the proposed increases upon a finding that the general level of rates as increased will be just and reasonable" (App. 227a).

In filing this Petition, the railroads followed the pattern that has become established over many years for seeking relief, as the railroads have from time to time considered it necessary, from the effects of increased costs and corresponding declines in freight earnings. As here, the railroads have in each case

asked the Commission to authorize, in a single proceeding, a general, across-the-board freight rate increase, usually by a stated percentage. The Commission deals with such a proposal in what is referred to as a general revenue proceeding—a formal investigation under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), in which the principal issue is whether the railroads' costs and revenue needs justify the proposed rate increases, and accordingly whether the new level of rates will be within a just and reasonable maximum. In making this investigation the Commission examines the financial position of the railroads in the aggregate, considering their operating costs and revenue under the standards of the so-called statutory "rule of rate making", Section 15a(2) of the Act.[1] The Commission may also, in additional "sub-parts" of the general proceeding, examine the effect of the proposed increase in rates upon the "movement of traffic" in particular commodities under the first clause of Section 15a(2), and consider such other matters as in its view are appropriate for preliminary consideration. The result of a general revenue proceeding is a Commission determination—incorporated in a package of

[1] Section 15a(2) reads: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." 49 U.S.C. 15a(2).

orders whose technical nature we shall discuss—that the general level of rates as increased will be lawful, with such modifications as the Commission specifically orders. The Commission expressly states—as it did here, App. 283a, 393a—that it is not prescribing particular rates, thus leaving the details open to future challenges by shippers in the normal course under Sections 13 and 15(1) of the Act, 49 U.S.C. 13, 15(1).

Apart from the obvious benefit to the railroads from a prompt Commission determination whether or not the increased general rate level is just and reasonable within the meaning of the Interstate Commerce Act, there are also technical reasons why the railroads seek affirmative Commission action in their favor rather than simply publishing new tariffs subject to possible investigation and suspension, as the law permits. First, since the filing of item-by-item tariffs, as the Commission's regular rules contemplate, is impracticable in the case of an across-the-board increase, the railroads need special permission to file a Master Tariff in short form; in this case, the Commission granted such procedural permission the day after the Petition was filed (App. 245a), and Master Tariff X–259, providing for the proposed increases, was filed on March 11, 1968. Second, affirmative Commission approval is needed in order for the railroads to implement increases in those various particular rates that have been specifically prescribed by the Commission in past rate proceedings under Section 15. Third, special permission under Section 4 of the Act, 49 U.S.C. 4, is needed to cover those instances where the general increase might inadvertently result in violations of the "long-short haul"

provisions of that section, which in general prohibit a railroad from charging more in the aggregate for the transportation of the same commodity over a shorter segment of line than over a longer segment and from charging through rates exceeding the aggregate of intermediate rates (See App. 396a–397a).

The railroads' 1968 Petition to the Commission contained extensive allegations of increased costs and declining revenues and claimed, tracking the language of the statutory rule of rate making set forth in Section 15a(2), that:

> Without the increases in freight rates and charges now sought to be published, the railroads' earnings would be seriously inadequate to finance needed improvements and they would be insufficient for the maintenance of adequate, economical and efficient service and for the preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense, contrary to the objectives of the National Transportation Policy. [App. 321a–232a]

The accompanying Master Tariff X–259—though filed less than a month after the Commission had authorized another general freight increase[2] requested in 1967—provided for rate increases ranging from 3 to 10 percent on the various commodities.

After receiving affidavits from the railroads and parties opposing the proposed increases and after hearing oral argument, the Commission on June 19, 1968, or-

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[2] Ex Parte No. 256, *Increased Freight Rates, 1967*, 329 I.C.C. 854; 332 I.C.C. 280.

dered a full-scale investigation into the lawfulness of the proposed rate increases under Section 15 of the Act; the investigation was denominated Ex Parte No. 259. In addition, as Section 15(7) permits, the Commission suspended the new tariff for a total of seven months pending completion of the investigation, stating, however, that it would allow the increases to go into effect temporarily to the extent they did not exceed 3 percent.[3] (App. 239a–242a.)

The Commission subsequently issued an order specifying procedures for the investigation and dividing it into two functionally distinct inquiries. The first and principal inquiry was an examination of the railroads' costs and revenue needs and the general level of rates; it bore the sub-investigation number Sub-No. 2. The second inquiry was an examination of the lawfulness of the increases in tariffs on particular categories of commodities, and it consisted of nine sub-investigations, numbered Sub-Nos. 3–11.[4]

The Commission held an exhaustive hearing in Sub-No. 2 on costs and revenue needs which lasted from September 9, 1968, to September 25, 1968. Every Class I railroad in the United States participated in this Sub-No. 2 hearing, as did 109 protestants, building a

[3] Accordingly, the railroads filed, effective June 24, 1968, a second master tariff, X–259A, which incorporated the permitted 3 percent increases for the duration of the suspension.

[4] Thus, for example, investigation Sub-No. 3 dealt with the new rates for carriage of coal, while Sub-No. 7 covered tariffs on a group of items ranging from woodpulp to textiles. See App. 243a–244a.

record over five thousand pages long.[6] The parties then fully briefed the issues involved in Sub-No. 2. On November 25, 1968, the Commission issued an interim report which contained its findings (App. 248a). That report found that the carriers had a critical need for additional revenue because of increased operating costs, and that, without the additional revenue to be obtained from the proposed general rate increase, they would be unable to provide adequate service (App. 274a–275a). The Commission further found that the general level of the rates proposed would not exceed a reasonable maximum and therefore approved it (App. 275a–276a).[7] Pursuant to this interim report, the Commission vacated its June 19 suspension order except as to certain commodities and gave appropriate authority for implementation of the new rates.

The Commission then went ahead with its subinvestigations into the rates and charges for the various commodity categories. On January 9, 1969, it issued its final report and orders. (App. 281a–398a). The final

[6] There were 1355 pages of verified statements submitted by the protestants, 1290 pages of verified statements submitted by the railroads, and 2429 pages of transcript of cross-examination; the total is 5074 pages.

[7] The Commission stated that this finding was without prejudice to different findings in regard to particular rates and charges when it concluded Sub-Nos. 3–11. It also noted that its "findings as to justness and reasonableness * * * will apply to the general bases of rates and charges," and asserted that it was not prescribing rates (App. 275a–276a).

report adopted and incorporated by reference the findings on costs and revenue needs and general rate level made in the interim report (App. 282a, 393a). Thus the Commission's "Ultimate Conclusions And Findings" repeated those of the interim report; in addition, they included findings approving and disapproving the reasonableness of the increases in tariffs for various classes of commodities on the basis of their effect on the movement of traffic and other factors (App. 392a, 393a). In its orders accompanying the final report, the Commission modified all of its outstanding rate orders that would otherwise prevent the railroads from charging the new rates, and authorized the carriers to depart from the long-short haul provisions of Section 4 to the extent necessary to put the new tariff into effect (App. 395a–396a). It also ordered the carriers to cease and desist " * * * from collecting basic rates increased to a greater extent than found just and reasonable herein * * * ." (App. 394a). Finally, it ordered the investigation discontinued (App. 395a). The Commission's opinion reiterated that it was not prescribing particular rates for specific commodities and route segments within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370,[8] and that the rates approved would be subject to case-by-case correction and to complaint and investigation in the normal manner at the instance of shippers (App. 393a).

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[8] *Arizona Grocery* held in effect that a shipper cannot obtain reparations with respect to any rate prescribed by the Commission.

Appellants in the *Alabama Power* case (No. 106), a group of dissatisfied shippers who had participated in the proceedings before the Commission, immediately brought an action under 28 U.S.C. 1336(a) in the District Court for the District of Columbia, seeking to set aside the Commission's orders (App. 173a).[9] They focussed their attack upon the Commission's findings as to the railroads' costs and revenue needs and the reasonableness of the overall rate level, charging that the Commission's ultimate findings were not supported by the requisite subsidiary findings or by substantial evidence in the record, that the Commission had failed to consider certain relevant evidence and that it had not applied the required standards.[10] They did not, however, focus any attack upon the findings of the final report allocating rate increases among the various commodity categories. (App. 180a–181a). The Secretary of Agriculture, who had opposed the rate increase before the Commission, intervened pursuant to 7 U.S.C. 1291(b) and 28 U.S.C. 2323 on the side of the plaintiffs. The Class I railroads intervened as defendants, contending *inter alia* that the court lacked jurisdiction to review the orders. The Interstate Commerce Commission waived any jurisdictional defense and defended its decisions on the merits, while the United States took a neutral position.

[9] The same plaintiffs had earlier sued to set aside the November 25 interim order; hence their suit bears a "68" docket number. Upon issuance of the Commission's final report and orders, they subsequently amended their complaint to include the later report and orders. It was on the basis of this later pleading that the district court decided the case.

[10] Among other things, the complaint alleged that the Commission erred in not differentiating among the varying revenue needs of different railroads.

The three-judge district court,[11] dividing 2–1, held that it did not have jurisdiction to review the Commission general rate increase order and it dismissed the suit (App. 220a). Relying on *Algoma Coal and Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.), the majority stated that plaintiffs' recourse was to attack particular rates before the Commission in Section 13 proceedings (App. 215a); it did not, however, decide or discuss whether the Commission's general findings on costs and revenue needs could be challenged by shippers in such Section 13 proceedings. Judge Wright, dissenting, thought that since the plaintiffs were attacking not particular rates but alleged overall deficiencies in the order which permitted a general rate increase, the court could review that order now. He observed that the Commission's action removed the prior ceiling on many prescribed rates, and as a direct result shippers were paying higher rates; he thus found the case ripe within the meaning of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (App. 217a).

The *Atlantic City Electric* case (No. 78) began later than *Alabama Power* when several users of coal on February 28, 1969, brought suit in the District Court for the Southern District of New York to set aside the identical general rate increase orders (App. 3a). The complaint filed by these plaintiffs first attacked the general aspects of the Commission's proceedings, alleging generally that the Commission had permitted

[11] Wright and Tamm, Circuit Judges; Corcoran, District Judge.

the rate increases without adequate evidence in the record, had failed sufficiently to examine the justness and reasonableness of the increase, and had committed various procedural errors (App. 7a). It also specifically attacked the Commission's treatment of the proposed increase in rates for the transportation of coal, as an example of an alleged general failure to consider adequately the losses in rail traffic that the increases would cause and to make a proper allocation of rate increases among the various commodities in terms of the costs of carrying each category (App. 8a-9a). Several states (which are appellants here along with the original plaintiffs) intervened as plaintiffs, filing a complaint (App. 36a) which did not make the overall attacks upon the Commission's general findings and procedures but was directed, with considerably more specificity than the coal users' complaint, to the authorization of a 6 per cent increase in rates on grain and feed moving into the Northeast; thus, for example, the states alleged that approval of these rates was improper because of the "disproportionate contribution [of these commodities] to rail revenues" (App. 40a) and because the new rates "were unduly prejudicial of the Northeast and unduly preferential of the Southeast" (App. 41a).

As in *Alabama Power,* the Class I railroads intervened, asserting, *inter alia,* a lack of jurisdiction to review, and the United States again took a neutral position. This time the Commission took a different position on review because it construed the complaints as attacking only the increased rates on particular commodities; it argued that these claims—unlike the

more general claims asserted in *Alabama Power*—were not subject to direct review under a proper reading of the doctrine established in *Algoma, supra.*[12] The three-judge district court[13] unanimously agreed and dismissed the complaints (App. 160a, 164a). Its opinion conceded—in tacit disagreement with the Commission—that "on the face of the complaint, plaintiffs [the coal users] do challenge the entire order and the Commission's conduct of the entire proceeding, not merely the part of it which relates to coal." (App. 159a). Nonetheless the court held, relying on *Algoma* and cases following it, that the real grievance of the coal users and the states was with the higher rates on the particular commodities of interest to them, and this grievance was required to be asserted in proceedings under Sections 13 and 15. It concluded, therefore, that "the statute does not contemplate an attack upon the general revenue order at this stage" (App. 163a).[14]

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[12] The Secretary of Agriculture is not a party in No. 78 and was not below.

[13] Kaufman, Circuit Judge; Bonsal and McLean, District Judges. This decision preceded the decision in *Alabama Power*, though the case began later.

[14] In a recent case decided by a different statutory three-judge panel of the District Court for the District of Columbia, the same result was reached. Plaintiff attacked the same order here in question, but only as it authorized increased rates on radio and television sets and electronic components. *Electronics Industries Association* v. *United States*, D. D.C., Civ. No. 1059–69, decided April 2, 1970. Notice of appeal to this Court was filed May 1, 1970, and the time for docketing has been extended to July 20, 1970.

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The rate increase in question in the instant litigation has been followed by two other filings by the railroads looking toward additional rate increases. On October 16, 1969, the railroads proposed an additional increase averaging six per cent; after receiving briefs and oral arguments, the Commission on November 17, 1969, in a proceeding denominated Ex Parte No. 262, decided not to suspend and to allow the new rates to go into effect subject only to an investigation into matters of discrimination and preference. That order is under attack in *Manufacturing Chemists Assn., et al.* v. *United States, et al.*, D. D.C., No. 3276–69, in which proceedings have been suspended pending decision of the instant cases. On March 9, 1970, the railroads proposed a second subsequent increase averaging six per cent, and after briefing and argument the Commission ordered a partial suspension (generally, to the extent the increases exceed five per cent) and an investigation, That investigation, Ex Parte No. 265, is still in progress, having been initiated on May 27, 1970.[15]

The instant litigation involves, in practical terms, the shippers' right to refunds of the increased freight

[15] The Commission's allowance of a partial increase in its suspension order is under a very limited attack in *Great Lakes Ship Owners Assn., et al.* v. *United States, et al.*, D. D.C., No. 1736–70.

None of the Commission's orders relating to these additional rate increases is yet reported.

rates they paid under the 1968 increase. It also will have an evident impact on subsequent rate increases, both in establishing the availability of judicial review and, on the merits, in ultimately determining the validity of the foundation upon which the subsequent increases are based.

ARGUMENT

INTRODUCTION

Both courts below dismissed the complaints before them on the common theory that the orders in the Commission's general rate proceeding were not subject to direct judicial review, holding that judicial review would be available to shippers only after the completion of challenges to particular rates, in administrative proceedings under Sections 13 and 15(1) of the Interstate Commerce Act, 49 U.S.C. 13, 15(1), as "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of [the Act] * * *", 49 U.S.C. 15(1). In *Alabama Power* (No. 106), the District Court for the District of Columbia did so despite the fact that it and all parties were in apparent agreement that the case involved only a challenge to the Commission's essentially separate Sub-No. 2 proceeding, in which the sole issue was whether the railroads' general revenue needs warranted an across-the-board nationwide rate increase; *Alabama Power* plainly involves no direct challenge to any particular rate. Although the Commission attempted to distinguish the controversy in *Atlantic City Electric* (No. 78) from that in *Alabama Power*

by arguing that the complaints raised not a general attack upon the revenue-needs decision but rather challenges to particular rates, the District Court for the Southern District of New York decided *Atlantic City Electric* upon the sweeping proposition that "the statute does not contemplate an attack upon the general revenue order at this stage" (*i.e.*, before the completion of further administrative proceedings under Sections 13 and 15) (App. 163a).

All three of the federal government parties on whose behalf this brief is filed are in agreement with the appellants in both cases that the courts below applied an erroneous principle in dismissing the cases before them. Specifically, all three agree that the plaintiffs in *Alabama Power* are entitled to immediate judicial review of the issue presented there—whether the Commission's findings on the railroads' costs and revenue needs and thus on the permissibility of the general increase in the level of rates in Sub-No. 2 were lawful and supported by substantial evidence. In *Atlantic City Electric*, however, there is some room for differing interpretations of the issues presented by the complaints of the coal-user plaintiffs and the intervening plaintiffs concerned with grain rates (all of whom are appellants here). The United States and the Commission (the only federal parties in No. 78, since the Secretary of Agriculture did not participate in the court below) are in agreement that the district court's theory of decision was, like that in *Alabama*

Power, erroneous; we believe that the Commission's orders were not *per se* unreviewable. However, the Commission believes that the complaint in *Atlantic City Electric* should have been dismissed, remaining of the view that the complaints in that case do not mount any general attack upon the revenue aspect of the Commission's decision but rather amount only to challenges of the manner in which the Commission treated rates on particular commodities; such matters, the Commission believes, must be administratively considered further in case-by-case challenges of particular rates on particular traffic segments before they will be ripe for judicial consideration. For reasons that will be detailed in part II of the Argument, the United States agrees with the Commission that the complaints in *Atlantic City Electric* do not state a claim for direct judicial review insofar as they challenge the Commission's preliminary treatment of the rates on particular commodities; the United States believes, however, that the district court properly viewed the complaints as attacking also the general revenue aspect of the Commission's decision, and therefore that the case should not have been dismissed altogether and should be remanded, like *Alabama Power*, for further proceedings on the merits. We suggest further, however, that in the event of a remand it would be appropriate for the New York court to stay its hand until the general issue has been decided by the District of Columbia court, where suit

was first filed, and for the latter court to allow the New York parties to participate.[16]

Because of this somewhat complex interrelationship of the two cases, we begin with a discussion of *Alabama Power,* discussing also *Atlantic City Electric* on the assumption that it presents the same issues as *Alabama Power.* In part II of the Argument, we proceed to an analysis of *Atlantic City Electric* as the United States and the Commission see it; both agree that it presents questions of judicial review not present in *Alabama Power,* as well as problems arising out of the fact that two courts have before them cases involving review of a single administrative proceeding.

SUMMARY

I

The complaint in *Alabama Power* focusses upon the Commission's final conclusions, following lengthy hearings, briefings and oral argument, upon the separate question of the railroads' revenue needs. Those conclusions are the indispensable foundation for the

[16] We take no position here on the merits of the Commission's action in any aspect of Ex Parte 259. Appellee railroads indicate that they will argue to this Court the merits of the Commission's action (Motion to Affirm, 19). This, however, is a matter for the district court, not for this Court at this time. Neither in *Alabama Power* nor in *Atlantic City Electric* did the district court express any opinion on the merits of the general rate order. In neither appeal did the appellants present the issue for decision by this Court. The record before the Commission was very long, and the issues are complex. In such circumstances the Court should not consider the merits of the general rate order until the district court has ruled upon them.

Commission's approval of the across-the-board increase in rates; they are based upon findings with respect to all of the railroads taken together, and involve no past or potential consideration of particular commodities or particular geographic areas. Each shipper has a direct interest in these conclusions, since, if they are wrong, the whole rate increase must be rolled back. The Commission has made it clear that its revenue decision is administratively final, and would not be considered further in any potential future proceeding challenging particular rates. Accordingly, the presumption in favor of judicial review of adverse agency action applies. *E.g., Abbott Laboratories* v. *Gardner,* 387 U.S. 136. Although the Commission's proceedings did result in certain orders giving the railroads affirmative relief from previously prescribed rates and the long-short haul restrictions of Section 4, we do not rely upon the formal nature of the Commission's action, since "[t]he technical form of the order is irrelevant", *City of Chicago* v. *United States,* 396 U.S. 162, 166. What is determinative is that the Commission has made a decision of the separable revenue questions that is administratively final in every practical sense.

The railroads argue that review is not now available because the shippers have allegedly not exhausted their administrative remedies by attacking the rates of interest to them in case-by-case proceedings under Sections 13 and 15(1) of the Interstate Commerce Act. But there is nothing in the statutory scheme that evidences any Congressional intent that such further administrative proceedings precede judicial review of

a final general revenue-need determination such as the Commission has made here, and the general doctrine of exhaustion of administrative remedies erects no barrier under the circumstances of this case. That doctrine is simply another aspect of the finality requirement, and it does not apply here because the Commission has fully considered and reconsidered the revenue questions; there is no premature interruption of the administrative process and no likelihood that the agency would itself give the general relief that the appellants seek. Proceedings under Sections 13 and 15(1) with respect to particular rates would in any event provide an inappropriate forum for consideration of general revenue needs and could add nothing to what the Commission has already done. Moreover, both shippers and railroads have a strong interest in knowing promptly whether the underpinnings of the general rate increase are sound or not: shippers because of the injury they suffer in paying excessive rates pending a final judicial decision and railroads because of the complexity of refunding excessive rate collections over an extended period. The district court decision many years ago in *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va.), upon which the railroads and the courts below rely heavily, is outmoded except insofar as it stands for the proposition that particular rates increased under a general revenue order must be challenged under Sections 13 and 15 before judicial review is available.

Insofar as the railroads' objection to direct judicial review is based upon the specter of interlocutory relief

in favor of shippers pending such review it is without foundation. They overstate the likelihood that a general increase would be enjoined *pendente lite* under the accepted standards, which require a showing of irreparable injury, likelihood of success on the merits, public interest and lack of unacceptable harm to other parties. Moreover, the railroads' interests could be protected by conditions upon any stay. In any event, the railroads' arguments in this regard are irrelevant to the basic question whether judicial review should be allowed; they properly suggest only reasons why interim relief might not be given in particular cases as an incident to judicial review.

II

Insofar as the appellants in *Atlantic City Electric* attack the Commission's failure, in the general rate proceeding, to consider costs, revenue needs and rate of return on a commodity-by-commodity basis, the United States believes that they state a claim for judicial review similar to that stated in *Alabama Power*. However, much of the complaints in *Atlantic City Electric* amounts to an attack upon the manner in which the Commission made its preliminary allocation of the general increase among particular commodities and areas; the United States and the Commission both believe that those matters are not ripe for judicial review, and the Commission further believes that the attacks on the revenue findings in *Atlantic City Electric* fall into this same category. The challenges to the allocation of the rate increases involve questions of the effects of increased rates upon the

movement of traffic by rail, which cannot be decided without consideration of the circumstances peculiar to the various commodities and various geographical areas, and also involve questions as to whether particular rates are unreasonable or discriminatory. Such questions cannot appropriately be finally decided in a general proceeding relating to all rates throughout the country, and the Commission's consideration of them in the general rate proceeding was preliminary only. Thus, there has not yet been final agency action as to these matters, and final agency action must await the completion of particular proceedings under Sections 13 and 15(1), where further evidence relating to particular situations can be considered. This is not to say that the Commission's preliminary determinations in the general proceeding as to the allocation of the rate increases will not ultimately be reviewable to the extent that they are ultimately relied upon by the Commission. It is only to say that those preliminary determinations are not now ripe for review because they may well become irrelevant or be refined when the Commission considers particular rates in more specialized and detailed future proceedings under Sections 13 and 15(1). The fact that the appellants in *Atlantic City Electric* have generalized some of their objections by calling them objections to the methods followed in the Commission's preliminary consideration does not change the situation; any such procedural complaints unavoidably implicate the merits and may well disappear when the Commission considers the rates further in future proceedings.

III

If the Court agrees that *Alabama Power* and *Atlantic City Electric* should be remanded for consideration of the merits in whole or in part, it may find it appropriate to suggest some procedural guidelines for what will then amount to a new avenue of judicial review of general rate orders. These two cases involve review of the same Commission proceedings, and future general rate proceedings may well result in multiple review proceedings under the relatively unspecific statutes providing for review of ICC orders. In such future cases, consideration should be given to consolidation by transfers of venue under 28 U.S.C. 1404(a) or by staying all suits after the first. In the present circumstances, we believe that any further proceedings in *Atlantic City Electric* should await a decision in *Alabama Power*. In addition, the Court may wish to provide the district courts with guidelines for the grant or denial of stays pending review of general rate increases.

I. THE COMMISSION'S ENDORSEMENT OF THE GENERAL RATE LEVEL IS DIRECTLY REVIEWABLE

A. THE COMMISSION'S DECISION AS TO COSTS, REVENUE NEEDS AND THE REASONABLENESS OF THE GENERAL RATE LEVEL WAS FINAL AGENCY ACTION RIPE FOR JUDICIAL REVIEW

The complaint in *Alabama Power* sought review of certain of the "Ultimate Conclusions and Findings" in the Commission's "Final Report and Order" of January 9, 1969; the complaint quoted the findings

in question (which appear at App. 391a–393a) as follows (App. 181a–182a):

> 1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges, subject to the limitations and exceptions set forth below, are permitted to be continued or to be put into effect.
>
> 2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.
>
> 3. Respondents may justly and reasonably be permitted to continue and to establish the increased interstate freight rates and charges approved in our interim report * * * [with certain exceptions not relevant to the issue raised by this Amended and Supplemental Complaint]
>
> * * * * *
>
> 13. The increased freight rates and charges authorized herein will not exceed a maximum reasonable level, and the revenues derived therefrom will result in earnings and rates of return for the railways, as a whole and by the usual

> groupings, not in excess of that required to enable them to render adequate and efficient transportation at the lowest cost consistent with the furnishing of such service.

These findings were a largely verbatim reiteration of the findings set forth in the Interim Report and Order of November 25, 1968, in Sub-No. 2 (See App. 274a–275a, Findings 1–3) and, as we have noted, the Final Report expressly adopted the discussion of costs and revenue needs appearing in the Interim Report without further consideration (App. 282a).

As we have described, the railroads' costs and revenue needs were the subject of a full hearing that lasted two weeks. Dozens of parties participated, including all of the railroads and numerous representative shippers, building a record several thousand pages in length and exhaustively briefing these questions. The resulting Report went into a specific and detailed analysis of costs and revenues and carefully calculated rates of return, the result of which was a conclusive administrative determination that the general level of revenues sought by the railroads was reasonable and necessary for their continued effective operation. As the Interim and Final Reports clearly evidence, the Commission regards these matters as closed for the period covered and not subject to further reconsideration (except as may be necessitated by judicial review). Although any "maladjustments" in the various particular rates and charges were expressly left open for "correction" and all rates and charges were expressly left "subject to complaint and

investigation as provided by the act" (App. 276a, 393a), there was no such reservation as to these crucial underlying determinations, which are thus administratively final.

As the district court in *Atlantic City Electric* pointed out, "The general revenue order authorizing the overall increases is a necessary foundation or starting point for any subsequent determination of rates specifically applicable to plaintiffs" (App. 163a). But for the Commission's determination that the railroads had serious additional revenue needs, there would have been no rate increase, and if that determination was wrong, the general increase must be rolled back without consideration of the other matters discussed in the Final Report (Sub-Nos. 3–11) or any matters that might be raised by a particular shipper in challenging the rate on a particular commodity travelling over a particular segment. That is implicit in the rule of rate making, 49 U.S.C. 15a(2), which—read together with 49 U.S.C. 15(1) and (7)—required the Commission in the suspension proceeding before it to set aside any rate unjustified by railroad costs and revenue needs. Moreover, as the Commission's handling of the proceedings makes clear, the questions of overall need and reasonableness are distinctly severable from the question of how that overall increase should be allocated among the various commodities and whether or not a particular rate is fair or discriminatory. Ordinarily, it could not reasonably be contended that a particular rate increase, or even an increase on a particular commodity, is essen-

tial to provide the revenues needed by the railroads, since adequate additional revenues could be obtained from increases in the rates on other commodities or in other areas. Thus, the general revenue proceeding in Sub-No. 2 was both a necessary and a sufficient separate premise for the general increase.

While it might fortuitously happen that a particular shipper might have his particular rate increase wholly set aside on grounds of unreasonableness or discrimination unrelated to the general need for rate increases, it is evident that this would be extremely unlikely in any significant number of cases. Thus, each shipper has a direct interest in the Commission's determination that a general increase was justified; in the terms of administrative review, the shippers are directly aggrieved by the Commission's determination that rates may be increased, since no shipper would likely be paying more to ship what he ships to his particular destination unless the Commission had so determined.

In the light of these factors, we see no room for doubt that the Commission's across-the-board rate determinations are subject to direct and immediate judicial review, as the complaint in *Alabama Power* (and, on the United States' reading, the complaint in *Atlantic City Electric* in part) seeks. This Court reiterated last term in *City of Chicago* v. *United States*, 396 U.S. 162, 164, that:

> As stated in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is "per-

suasive reason to believe" that Congress had no such purpose.

See also, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 156–157; *Barlow* v. *Collins*, 397 U.S. 159, 165–167. "It is * * * 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent' that the courts should restrict access to judicial review" (*id.* at 167). Moreover, there can be no doubt of the ripeness of these across-the-board determinations for immediate judicial review. As we have shown, the direct impact of the Commission's action upon the shippers is plain: they pay higher rates every day because of it. Compare, *e.g.*, *Abbott Laboratories*, 387 U.S. 136, 152. And the Commission's decision as to the justifiability of increasing the general level of rail rates was final in the pragmatic sense in which such finality must be determined. *Id.* at 149–151; *Frozen Food Express* v. *United States*, 351 U.S. 40.

The district court in *Alabama Power* appears to suggest that the Commission's decision as to revenue needs is not reviewable because the resulting orders "are permissive and not mandatory" (App. 215a). But surely it is too late in the day to suggest that the affirmative or negative nature of agency action determines its reviewability; the railroads concede "such a position is not tenable today" (Motion to Affirm, p. 14). As the Court held in *City of Chicago, supra*, such a theory of decision "is of the vintage we discarded in *Rochester Telephone* [*Corp.* v. *United States*, 307 U.S. 125]", 396 U.S. at 167. Here, as in

City of Chicago, the Commission conducted a full-scale investigation on the basis of evidence, briefs and oral arguments presented to it by adversary parties and made a decision on the merits. As the Court there held, such a decision, if final, is reviewable agency action, and "[t]he technical form of the order is irrelevant". *Id.* at 166.[17] Nor is it any barrier to review of this decision that the orders implementing it, such as they were, also related to aspects of the Commission's consideration that may not (as we discuss in part II, *infra*) have been sufficiently final to be directly reviewable. The Administrative Procedure Act, in giving a right to review of "final agency action" (5 U.S.C. 702, 704), defines "agency action" as "the whole or a part of an agency * * * order, * * * relief, or the equivalent or denial thereof, or failure to act" (5 U.S.C. (Supp. IV) 551(13)). Thus, the only question is whether there is an isolable final agency decision, without regard to the technical form it may take. There was such a final decision here authorizing an increase in the overall rate level.

[17] Accordingly, although we note that the Commission's resolution of the general revenue proceeding did result in orders granting affirmative relief to the railroads with respect to rates previously prescribed by Commission orders and the long-short haul restrictions of Section 4 (see pp. 4–5, *supra*), we do not consider that determinative. In *City of Chicago* it was enough that the Commission issued an order discontinuing its investigation, and a similar order was also issued here (App. 395a).

B. THE STATUTORY SCHEME FOR CHALLENGING PARTICULAR RATES IS NO BAR TO DIRECT JUDICIAL REVIEW OF THIS ACROSS-THE-BOARD DECISION.

Despite these compelling indicia of readiness for immediate judicial review under familiar principles, the district courts below held—and the railroads argue—that the shippers' exclusive remedy is to go again to the Commission under Sections 13 and 15(1) with case-by-case attacks on the detailed rates affected by the new Master Tariff and to seek judicial review of the resulting administrative proceedings. The railroads' argument appears to come down to either or both of two positions: (1) the determination of railroad costs and revenue needs in the general revenue proceeding is fully reviewable, but only under cover of a Section 13 proceeding to attack a specific rate (Motion to Affirm, pp. 16, 17); or (2) that determination is not reviewable at all because "preliminary" or "general" or because it does not impinge on any "legal interests" (Motion to Affirm, p. 15). The railroads have not thus far chosen between these two inconsistent arguments, and the majority in *Alabama Power* did not analyze the problem to the extent of expressing either proposition; the district court in *Atlantic City Electric* quite clearly chose the first proposition, stating that the plaintiffs could preserve their objections to the general revenue

order and have them judicially reviewed if the Commission again rejects them in a Section 13 proceeding (App. 163a).

The second of these two propositions—that the determination of the proper overall level of rates is not reviewable at all—is answered by what we have already said,[18] and accordingly we now turn to the first, which amounts to a contention that the shippers have not exhausted their statutory remedies before the agency and so should be denied judicial review even though the determination they attack is final and otherwise ripe under general principles.

At the outset, we note that the railroads and the courts below have pointed to nothing in the statute or in its legislative history that directly discourages prompt judicial review in these circumstances. Nor are we aware of any special indication that Congress has intended that proceedings under Sections 13 and 15(1) should be the exclusive path for seeking review of a Commission determination made, as here, in a rate suspension proceeding under Section 15(7). Thus, the railroads' argument must depend entirely upon general concepts of exhaustion of administrative remedies in the interest of orderly procedure.

This Court recently had occasion to discuss extensively the considerations of policy which underlie the

[18] We observe further, as did Judge Wright in dissent, that by analogy *United States* v. *Louisiana*, 290 U.S. 70, stands for the proposition that a general rate increase order is subject to judicial review (App. 217a). That case involved review of a Commission order setting intrastate rates under Section 13(4) of the Act.

doctrine of exhaustion of administrative remedies. *McKart* v. *United States*, 395 U.S. 185. The Court stated that "[a] primary purpose is, of course, the avoidance of premature interruption of the administrative process." *Id.* at 193; see also, *Abbott Laboratories, supra*, 387 U.S. at 138. This permits the agency fully to develop the facts, apply its expertise and exercise discretion before it has to answer to a court: In addition, the Court pointed out that "[c]ertain very practical notions of judicial efficiency come into play as well." *Id.* at 195. The complainant may achieve the relief he wants before the agency and thus spare a court the need to hear the case; also, "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors." *Id.* at 195. In short, the principle of exhaustion of administrative remedies is nothing more than an aspect of the requirement of finality—admonishing that the courts should not intrude until the agency, in pragmatic terms, has definitively decided the matter sought to be reviewed. It is not a mechanical requirement that every theoretically available administrative procedure must be tried even after the agency has made it plain that its decision is final.[18a]

[18a] The Administrative Procedure Act explicitly so states: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of [judicial review] whether or not there has been presented or determined an application * * * for any form of reconsiderations * * *" (5 U.S.C. (Supp. IV) 704). There is no need to exhaust an administrative remedy which is sure to prove useless. Cf. *City Bank* v. *Schnader*, 291 U.S. 24; also *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145 (C.A. 5), certiorari denied, 298 U.S. 688.

None of the considerations that might call for further resort to the agency are present with respect to the Commission's approval of an increased general rate level. The matters in question—the railroads' costs and revenue needs—were a separate issue considered by the Commission in a separate subproceeding that is now complete. The decision—whether lawful and supported by substantial evidence or not—was the result of a full, lengthy hearing devoted specifically to these matters, and the Commission had ample "chance to discover and correct its own errors." It first issued its disputed findings in the interim report of November 25, 1968. Several shippers who had participated in the proceedings petitioned for reconsideration of the interim report. Yet the Commission in its final report of January 9, 1969, completely reaffirmed the findings on costs, revenue needs and general rate level which it had made in the interim report (App. 282a, 391a, 393a). Thus, there can be no doubt that the administrative process is in practical terms complete with respect to these matters and that judicial review will not result in any "premature interruption."

Because the challenged administrative action is final, there is good sense to the position which the Commission apparently took in *Koppers Co., Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 387: that in a Section 13 challenge to a particular rate the Commission will not hear a contention that the underlying general revenue order was not adequately supported

by the evidence.[19] This only emphasizes the appropriateness of direct judicial review of such an order. The fact, cited by the appellee railroads (Motion to Affirm, 16), that in some Section 13 cases involving particular rates the Commission has looked into the costs and revenue yields of particular service is simply irrelevant to the question of prompt review of Commission findings made in a general revenue proceeding on the costs and revenue needs of the nation's railroads taken as a whole and on the general level of rates.[20]

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[19] This Commission decision was a sequel to the district court opinion in *Koppers Company* v. *United States*, 132 F. Supp. 159 (W.D. Pa.), p. 37, n. 22, *infra*.

[20] In none of the Section 13 cases cited by appellees is there any indication that the parties challenged or that the Commission considered the validity of findings on costs and revenue needs entered in a prior general revenue proceeding. In *Rochester & Pittsburgh Coal Co.* v. *Baltimore & Ohio*, 294 I.C.C. 423 (1955), the only costs in issue were the costs of carrying coal between the Reynoldsville District of Pennsylvania and Buffalo; nobody contested the lawfulness of any findings entered in any general revenue proceedings. *Avera Packing Co.* v. *Atlantic Coast Line R. Co.*, 296 I.C.C. 17 (1955), was a dispute between shippers and carriers over the proper rate for the carriage of hogs from East St. Louis to points in the southeast; the Commission did not even mention any general rate increase except to state that the hog rates set in 1942, as subsequently increased as a result of general rate increases, were still just and reasonable. In *Baltimore & O. R. Co.* v. *Chicago & E.I.R. Co.*, 318 I.C.C. 771 (1963), reversed on reconsideration, 322 I.C.C. 572 (1964), a group of railroads contested another railroad's ex-river rail rate on bituminous coal between Mt. Vernon, Indiana, and Chicago; the costs in issue were the cost of the Mt. Vernon-Chicago service, and the parties—all rail-

If the Commission—as the railroads seem to suggest it should—were to reconsider its general cost and revenue findings in individual Section 13 cases, the result would be, as Judge Wright's dissent observed "* * * needless relitigation of the same issue before the Commission in countless rate-making proceedings involving individual commodities" (App. 217a–218a). Thus every Section 13 case might risk becoming a truncated and inadequate general revenue proceeding, as shippers again and again litigated issues which the Commission had already determined in the prior general revenue proceeding. Under such circumstances, the Commission as a practical matter could do no more than reaffirm its earlier determinations. It would lead to unconscionable uncertainty if, after the extensive consideration the Commission had already given to these general questions, it were to reopen them in the narrow context of disputes over particular rates in particular areas.

Because the general revenue and rate-level determinations are the common underpinning for the existence of each of the various particular rate increases that have taken effect, there are strong practical reasons why the propriety of those determinations should be judicially reviewed, once and for all, as soon as possible. The considerations here are the same as

roads and all beneficiaries of general rate increase orders—never challenged the general rate increase orders.

These cases do show, however, that in Section 13 proceedings where shippers challenge a rate or group of rates as unjust, unreasonable or unjustly discriminatory, the Commission treats the lawfulness of the general rate level as already established by its general rate increase orders.

those that induced the railroads to request and the Commission to give expedited administrative consideration to these general matters. As we have noted, inflationary pressures in recent months have resulted in two general rate increase proposals since the one here in question (p. 13, *supra*); under such conditions both shippers and carriers have an evident interest in a prompt final decision on the lawfulness of each of those increases. Among other things, the longer the delay the greater is the injury to shippers who may have been forced to advance funds, through higher rates, that they were in fact entitled to keep and the greater is the complexity of the accounting processes involved in making refunds. And, as we have shown, there is neither a legal nor a practical reason why such final judicial decision should be delayed.

The decisions of both courts below relied heavily—and largely uncritically—upon the 1935 district court decision in *Algoma Coal and Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D.Va.) as being dispositive of these cases. These cases are, however, significantly different from *Algoma* (considering *Atlantic City Electric*, as we do throughout this part of the argument, only insofar as it attacks the decision as to the general rate level), and some aspects of that decision are highly dubious in the light of more recent developments in the law.

The plaintiffs in *Algoma*, producers of coal, sought review of a general rate order which had, among other things, authorized an increase in the rate for

coal. The plaintiffs objected specifically to the new, higher rate on coal. Thus the court stated: "The object of this proceeding is to enjoin putting these increased rates into effect, so far as they apply to the plaintiffs." *Id.* at 491.[21] The plaintiffs argued that the new coal rates would prejudicially affect the coal industry and render coal incapable of competing effectively with rival fuels. *Id.* at 492. The court dismissed the bill on the ground that plaintiffs lacked "status" to bring it and advised the coal producers to exercise their remedies under Sections 13 and 15 of the Act. *Id.* at 495, 496. Significantly, while the district court dismissed the suit on jurisdictional grounds, it did so only after review and approval of the Commission's action on the merits. *Id.* at 494–495.

Algoma thus properly stands for the important but limited proposition that a shipper may attack in court particular rates increased under a general rate order only after filing a complaint pursuant to Sections 13 and 15 of the Act challenging those rates as not just and reasonable. However, we are not here concerned with the kind of challenge which the court in *Algoma* had dismissed. The issue here is not particular rates but the Commission's alleged failure to make adequate findings on costs and revenues in support of the authorization to raise rates generally. *Algoma* as precedent does not bar judicial review in such a situation

[21] While plaintiffs did make some allegations which could be read as an attack on the general rate increase order because of insufficient findings as to the carriers' costs and revenue needs, *id.* at 492, the court read the bill as a contention that the Commission had "determined or fixed particular rates for the plaintiffs particular traffic." *Id.* at 496.

and the courts below erred to hold that it was a bar.

To the extent that *Algoma* may be said to support any holding about reviewability broader than the proposition stated above, it should be disapproved as a precedent. The district court's opinion was permeated with the now discarded notion that because agency action is permissive, it is not subject to review; indeed the court characterized the Commission's action as "* * * merely to permit the railroads to initiate new rates." *Id.* at 493. This was not only an inaccurate description of what the Commission had done; but was an expression of a theory of judicial review "of the vintage we discarded in *Rochester Telephone.*" *City of Chicago v. United States, supra,* 396 U.S. at 167.[22]

[22] As noted, the district courts in both *Alabama Power* and *Atlantic City Electric* relied principally upon *Algoma.* The two other cases cited below offer no reasons to affirm the district courts here. *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa.) was an effort by a coal user to obtain immediate review of that part of a general rate order which authorized a cheaper rate on the shipment of coal from the Southern Mines to Hampton Roads when destined for New England than when destined for New Jersey and Pennsylvania. The court dismissed the case because the plaintiff had not exhausted its administrative remedy. *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla.), affirmed *per curiam*, 352 U.S. 1021, involved an attempt to get immediate review of a general increase in which the Commission had authorized allegedly discriminatory refrigeration charges. The court dismissed for failure first to pursue Section 13 proceedings, but it did so only after deciding on the merits that the Commission's action was justified. On appeal the parties reargued the merits, and this Court affirmed. In each case the gravamen of plaintiff's complaint was discriminatory conduct by carriers under authorization of a Commission order; and in each case the court required an exhaustion of administrative

C. THE POSSIBILITY THAT INTERLOCUTORY RELIEF MIGHT BE GIVEN PENDING JUDICIAL REVIEW IS NO REASON FOR DENIAL OF REVIEW; ANY SUCH RELIEF SHOULD BE GIVEN SPARINGLY AND IN SUCH A MANNER AS TO PROTECT THE INTERESTS OF BOTH RAILROADS AND SHIPPERS

Insofar as the railroads object to direct review of the general revenue order on the ground that it would carry with it an unacceptable risk of an interlocutory injunction prohibiting the increased rates from taking effect, they raise a largely hypothetical and strictly irrelevant specter. The possibility of interlocutory relief is a normal incident of judicial review, and the statutes governing review of Interstate Commerce Commission orders contemplate that it will be available in appropriate circumstances "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury". 5 U.S.C. 705; 28 U.S.C. 2324, 2325, 2284(3). But the possibility that this incidental power may be abused, or should not be used in certain circumstances, is no support for any argument that the judicial power to review is lacking or should not be exercised. It is simply the basis for an argument that interlocutory relief should not be granted in particular cases. See *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 155–156.

The railroads greatly overstate the possibility that a district court would enjoin a general rate increase *pendente lite*. An interlocutory injunction could be granted only by a three judge court; a single judge

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remedies. These holdings are consistent with our position in this case that Commission findings on the railroads' costs and revenue needs and the general level of rates made in a general revenue proceeding ought to be immediately reviewable.

may grant a temporary restraining order only until the three-judge court can pass upon the application for an interlocutory injunction, and only upon a "specific finding * * * that specified irreparable damage will result if the order is not granted." 28 U.S.C. 2284(3). A temporary restraining order is "a drastic remedy" that requires a strong showing, *Stott* v. *United States*, 154 F.Supp. 389, 391 (S.D.N.Y.); *Braswell Motor Freight, Inc.* v. *United States*, 297 F.Supp. 215 (S.D.Miss.). And similarly stringent standards would govern any interlocutory injunction, including the specific requirement of irreparable injury set forth in the Administrative Procedure Act, 5 U.S.C. 705, and the need for a showing that the suit for review would be likely to succeed on the merits and that a stay would not cause unacceptable harm to other parties and would be in the public interest. *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Commission*, 259 F.2d 921, 925 (C.A.D.C.). Under these stringent criteria, we think it unlikely that a rail freight general revenue order would be restrained pending judicial review under existing economic conditions.[23] Such temporary relief was denied in *Alabama Power* and in *Manufacturing Chemists Association* v. *United States*, *supra* p. 14.

[23] In the present case, the railroads estimated before the Commission that their proposed rate increase would produce increased revenue of $466.2 million—some $89.2 million short of annual revenue needed simply to cover their increased expenses. App. 265a, 332 I.C.C. at 602. The total income of the Class I railroads in 1968 was $542.2 million and their rate of return on net investment was estimated to be 2.58 percent. App. 267a, 332 I.C.C. at 612. Thus each month of delay in a rate increase would be very costly, with perhaps as much as $40 million per month in revenue lost.

Even if a rate increase were temporarily enjoined, the district court would be further required to consider appropriate conditions to such a stay of the Commission's action. An appropriate condition—if there were any stay at all—might be a requirement that shippers pay the increased rates into a fund under the control of the court, which the court could then order disbursed to the shippers or the railroads depending upon the outcome of the suit. Compare *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577. While the feasibility and mechanics of such an arrangement would require careful district court consideration in any particular case, it might well be preferable to imposing upon shippers the burden of collecting reparations from the railroads in a case where their likelihood of success was relatively strong. And it would obviate the railroads' contention that they would have no redress if a stay pending an unsuccessful suit prohibited collection of the higher rates approved by the Commission.

II. THE COMMISSION'S CONSIDERATION OF THE ALLOCATION OF THE GENERAL RATE INCREASE AMONG COMMODITIES WAS NOT SUFFICIENTLY FINAL TO WARRANT JUDICIAL REVIEW AT THE PRESENT TIME.

After determining in its Sub-No. 2 proceedings that the railroads were entitled to an increase in revenue of the overall magnitude proposed, the Commission went on to consider, in Sub-Nos. 3–11, the lawfulness of the varying increases in the rates for particular categories of commodities that would make up the overall increase. In this part of the investigation, the

Commission focussed largely upon the first of the three clauses of the rule of rate making—"the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed", 49 U.S.C. 15a(2)[24]—and it concluded, with certain exceptions for which it provided, that the various increases proposed were in general consistent with this criterion. The Commission did not, however, purport to apply this criterion definitively to particular rates, noting that denial of increases on particular commodities on the ground, asserted by various shippers, that they would be self-defeating (by drying up traffic or causing its diversion to other modes) "would require evidential support more reliable and persuasive than has been provided *in this record*" (App. 285a; emphasis added). And, for example, in dealing with the contentions made in this regard with respect to coal, the Commission pointed out that "Should competitive situations arise, appropriate adjustments can be made by producers and carriers" (A. 310a). In addition, without purporting to be comprehensive, the Final Report dealt with various more particular matters, finding that certain of the proposed increases in rates and related charges would be unreasonable or discriminatory and directing that they be modified (see Findings 5–12, App. 392a–393a). Speaking generally, the Commission took pains to point out that

[24] The other two clauses of Section 15a(2) relate to the costs and revenue needs that were considered in Sub-No. 2. The Interim Report discussed this first clause only in a preliminary and very general way (App. 273a–274a).

> * * * [O]ur conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed. We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370. [App. 283a.]

As we have noted, the complaint in *Alabama Power* did not focus on these findings relating to the effect of the increases upon the movement of particular commodities and the reasonableness of particular rates and charges; rather, its attack was on the underlying findings, appearing primarily in the Interim Report, that the railroads' needs justified a general increase. The United States reads the complaint of the original plaintiffs in *Atlantic City Electric* (the coal users) as including in part a similarly reviewable attack upon the Commission's conclusive treatment of the railroads' costs and revenue needs. Thus, in paragraphs 12 and 14 of their complaint, the coal users complained that the Commission considered "no evidence as to the present cost to the railroads for providing the transportation services involved with respect to any commodity" (App. 8a) and that the increase in coal rates

> * * * was permitted in the face of substantial and uncontroverted evidence that coal traffic, prior to such increase, produced a disproportionate return to the carriers over and

> above the costs to them of providing that service. The order, in determining that cost of service for a commodity group or movement is an irrelevant factor in a rate proceeding, has merely established the test of "what the market can bear" as the governing principle herein and, as set forth above, has then proceeded to abdicate to the carriers the ICC's statutory function of determining just, reasonable and non-discriminatory rates. [App. 9a.]

The United States interprets these allegations as amounting to a general objection that the Commission misapprehended the issue as to revenue needs and should have considered the railroads' needs commodity by commodity rather than in gross.[25] In the view of the United States, such an objection falls within the category discussed in part I of the Argument and therefore is subject to direct judicial review. The Commission disagrees, viewing these allegations as attacks upon the particular coal rates, and thus of the same nature as the further allegations that we discuss in the next paragraph.

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[25] The complaint appears to be referring in this regard to the discussion in the Final Report (App. 284a and 285a) concerning the significance of the costs and contributions to revenue from the carriage of particular commodities; the Commission there stated the general conclusions that "rates substantially in excess of full costs do not necessarily exceed a maximum reasonable level" and that "[c]osts of specific commodity movements are not in issue" (App. 285a). The United States reads the *Atlantic City Electric* complaint as attacking these general propositions. It should be clear that the line between what is reviewable directly and what is not depends upon the nature of the issue and not which Report discusses it.

The remaining allegations of the coal users' complaint in *Atlantic City Electric* must, in the view of the Commission and the United States, be read as attacks upon the reasonableness of particular rates and the effect of the increases in such rates upon the movement of traffic in the commodities affected. Thus, the coal users complained, *inter alia*, that the Commission

> * * * allowed these increased freight rates to be put into effect with no evidence in the record to rebut the voluminous, specific and detailed evidence presented by shippers, including plaintiffs, that substantial loss of traffic would result from the proposed increases. [App. 8a.]

They also asserted that the Commission's proceedings were procedurally defective (App. 7a). The complaint of the intervening states in *Atlantic City Electric* was directed largely to rather specific objections to the increased rates on grain moving to the Northeast (p. 11, *supra*).

The Commission and the United States are in agreement that these remaining allegations in *Atlantic City Electric* do not state claims warranting direct judicial review because the administrative action attacked does not have the requisite degree of practical finality. In contrast to the question of what the railroads need in the aggregate, the questions here necessarily relate to what particular shippers or groups of shippers are willing to pay (rather than decide not to ship by rail or not to ship at all) and what those shippers can equitably be required to pay (in light of the principle that rates and charges are not to be "unjustly discriminatory or unduly preferential or prejudicial,"

49 U.S.C. 15(1)). These narrower questions cannot be finally answered by the Commission until it has considered the rates on particular commodities between particular points, as Sections 13 and 15(1) will permit it to do subsequently; by the nature of the problem, the final answers will vary from shipper to shipper, from commodity to commodity and from area to area. Accordingly, although the Commission dealt to some extent with these matters in the general rate proceeding, it did so—as we have described—in a preliminary and uncomprehensive way, looking toward further particularization in proceedings under Sections 13 and 15(1).[26]

We do not, of course, question the ultimate reviewability of what the Commission has done in these areas in the general rate proceeding; to the extent that the Commission may rely upon it in further proceedings under Sections 13 and 15 it will be reviewable then.[27] But since the Commission will consider more

[26] Of course, such proceedings can be grouped in whatever matter will be most appropriate in light of the issues raised. Thus, for example, all coal shippers in a relevant area could initiate a joint proceeding to consider diversion. But a joint proceeding involving coal and grain would probably not make sense; certainly, it seems to us that a joint proceeding involving all commodities throughout the country would be unmanageable if it tried to consider all pertinent matters definitively. The Commission did not have such a proceeding before it when authorizing the general rate increase.

[27] The Administrative Procedure Act provides that "A preliminary, procedural, or intermediate agency action not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. 704. Thus, there will be no hiatus in what is subject to review at an appropriate time.

detailed evidence with respect to more specific situations brought before it, the preliminary findings that were made in the general rate proceeding may well be inapplicable or require refinement in any such specific situation, such as those raised here by those interested in coal and grain rates. Thus, there remains a meaningful administrative remedy that has not been exhausted, and, if the courts were to intrude at this juncture they would indeed be "entangling themselves in abstract disagreements over administrative policies", for, although we acknowledge the effect of the rate increases upon shippers (p. 27, *supra*), there would be "judicial interference [before] an administrative decision has been formalized". *Abbott Laboratories* v. *Gardner, supra,* 387 U.S. at 148. In the language of *McKart* v. *United States, supra,* 395 U.S. at 195, a shipper unhappy with the share of the railroads' increased revenues that is contributed by his shipments of coal "may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." As we showed in part I, there is in practical terms no further administrative recourse as to the across-the-board revenue issues; there is, however, as to the manner in which those increased revenues are derived from shipments of various commodities.

It is not determinative that the coal and grain interests that have sued in *Atlantic City Electric* have generalized some of their objections to the Commision's preliminary findings on diversion and discrimination by framing them as attacks on the procedure or meth-

odology followed in Sub. Nos. 3–11 of the general rate proceeding. Indeed, it is likely that many of their objections to the kind of evidence the Commission relied on in its preliminary conclusions will evaporate when the Commission considers further detailed evidence in more specialized proceedings under Sections 13 and 15(1). Even if it could be said that the procedures or methods attacked are common to the Commission's consideration of all of the various commodities, the issues thus raised are inevitably intertwined with the merits and cannot be meaningfully abstracted. It would be another matter if the objection were the sweeping one that the Commission could not make any findings of any kind on rate allocations in the general rate proceeding unless it considered all the matters as to each and every rate that it would consider in full-scale proceedings challenging each rate; then, the shipper would be attacking the very concept of a general rate proceeding that does not fully prescribe rates in the technical sense, and that broad-scale objection to the procedure used by the Commission would be directly reviewable. But we do not understand the plaintiffs in *Atlantic City Electric* to make that broad contention, and doubt that it would seriously be made by any shipper.[28] See *United States* v. *Louisiana*, 290 U.S. 70.

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[28] It is not necessary to reach in this case the question, suggested by the appellants in *Atlantic City Electric*, of what the burden of proof might be as to the various further issues that might be considered in proceedings under Sections 13 and 15(1) before the Commission finally determines the just and reasonable rates for particular commodities, in particular areas. For purposes of judicial review—the only question here—it is suffi-

III. PROCEDURAL CONSIDERATIONS

The confluence of the *Alabama Power* and *Atlantic City Electric* cases illustrates a problem that is inherent in the relatively unspecific statutory scheme for review of orders of the Interstate Commerce Commission. With respect to agency orders reviewed in the courts of appeals, the Judicial Code expressly provides that if proceedings to review the same order have been filed in two or more courts, the agency record will be filed in the court where proceedings were first begun and proceedings begun in any other court will be transferred to the first court. 28 U.S.C. 2112(a). There is, however, no similar statutory provision for consolidation of judicial review proceedings properly taken to the district courts, such as proceedings to review orders of the Commission. The result has been that in this instance separate proceedings to review the same agency action have been taking place in the

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cient to note the obvious proposition that to the extent any Commission finding in the general proceeding remains pertinent to any such final determination, and thus is subject to judicial review thereafter, the reviewing court will review such finding in the terms in which the Commission made it; there will be no change in the burden of proof as to that finding. To the extent that the burden of proof may change as to additional matters considered in the further administrative proceedings (a matter that will be subject to judicial review thereafter), the answer to any general objection is simply that the Commission's determination to have a general proceeding as to some matters did not give shippers a vested right to have the burden of proof in that proceeding apply to all matters pertinent to a particular rate. Otherwise, the Commission would in effect be denied its basic discretion to order its proceedings in whatever reasonable, manner appears most appropriate in its informed judgment.

district courts for the District of Columbia and the Southern District of New York; in future cases involving general revenue orders there may well be even more courts involved, especially in view of the fact that there is no statute of limitations with respect to review of Commission orders. Since acceptance of the appellants' positions in the instant cases would in practical terms amount to the establishment of a new kind of ICC review proceeding with broad geographic application, the Court may in that event wish to suggest to the district courts procedures that will prevent potentially disorderly review situations from occuring.

This Court considered the problem of multiple district court suits reviewing agency action in *Abbott Laboratories* v. *Gardner, supra,* 387 U.S. at 154–155, pointing out that "the courts are well equipped to deal with such eventualities," *inter alia,* by use of the venue transfer provision, 28 U.S.C. 1404(a), or by staying subsequent suits pending the conclusion of a primary suit. The Court also considered a somewhat similar problem in its recent decision in the *New Haven Inclusion Cases,* Nos. 914 *et seq.,* 1969 Term, decided June 29, 1970; there, the Court directed one of the district courts involved to stay its hand pending the completion of action by another.

If the Court agrees with us that the judgments of both district courts in the instant cases should be reversed, we believe that it would be appropriate to direct the New York district court to stay further proceedings in *Atlantic City Electric* pending completion of the District of Columbia district court's consideration of the merits of the *Alabama Power* case, which

was filed first and might render *Atlantic City Electric* substantially moot if the plaintiffs are given the relief they request. It would appear appropriate to allow the plaintiffs in *Atlantic City Electric* to appear as *amici curiae* in *Alabama Power* on remand, and perhaps to permit them to intervene as parties; however, the latter determination would best await the filing of a motion to intervene by those parties, if they are so disposed, so that the district court could consider the nature of the claims that they might wish to present. Although in some future situations it might be the best course for all suits to be consolidated in a single district court by transfer of venue, we hesitate to suggest that at this stage of these cases since, depending upon this Court's decision as to the scope of review, the New York case may well involve issues quite distinct from those in the District of Columbia case.[29] Thus, we think that the details of the manner in which these two cases can most efficiently be handled should be worked out by the parties and the district courts involved, subject only to the general principle that proceedings in New York should await the conclusion of proceedings in the District of Columbia.

In addition, it might be appropriate for this Court's opinion—assuming reversals—to set forth general guidelines for the grant or denial of interlocutory relief pending judicial review of ICC general revenue

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[29] Of course, it should be open to the parties in both cases freely to amend their complaints in the light of this Court's decision.

orders, along the lines that we have discussed earlier (pp. 38–40, *supra*).

CONCLUSION

For the reasons stated, the judgments of the district courts should be reversed and the causes remanded for further proceedings.

Respectfully submitted.

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JULY 1970.

APPENDIX

STATUTES INVOLVED

1. Administrative Procedure Act, as revised, 5 U.S.C. (Supp. IV):

§ 551. Definitions.

* * * * * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

§ 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

* * * * * *

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate

remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review.

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

2. Judicial Code, 28 U.S.C.:

§ 1336. Interstate Commerce Commission's orders.

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

* * * * *

§ 2324. Stay of Commissioner's order.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Com-

merce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

§ 2325. Injunction; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§ 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

* * * * *

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

* * * * *

3. Interstate Commerce Act, as amended, 49 U.S.C. 151, *et seq.*:

§ 13. Complaints to and investigations by Commission.

(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. [49 U.S.C. 13]

* * * * *

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate,

fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

(7) Commission to determine lawfulness of new rates; suspension; refunds.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had

become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

* * * * *

[49 U.S.C. 15(1), (7)]

§ 15a. Fair return for carriers.

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

[49 U.S.C. 15a(1), (2)]

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Nos. 78 and 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ATLANTIC CITY ELECTRIC COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ALABAMA POWER COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeals From the United States District Court for the Southern District of New York and the United States District Court for the District of Columbia

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BRIEF OF APPELLEES ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 78

ATLANTIC CITY ELECTRIC COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

No. 106

ALABAMA POWER COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeals From the United States District Court for the Southern District of New York and the United States District Court for the District of Columbia

---

BRIEF OF APPELLEES ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

QUESTIONS PRESENTED

In a general revenue proceeding the Interstate Commerce Commission entered orders permitting the railroads to increase the general level of freight rates, within certain maximum limits, on the basis of findings

that applied "to the general bases of rates and charges" but did not make any final determination on the legality of particular rates. The questions presented are:

1. Whether the orders and findings of the Commission are reviewable on the complaint of shippers who have not availed themselves of their specific statutory right to have the Commission determine the legality of the particular rates specifically applicable to the commodities that they ship.

2. If the first question is answered in the affirmative whether the orders of the Commission here in issue represent reasoned exercises of the Commission's judgment, are supported by substantial evidence on the entire record, and are otherwise lawful.

STATEMENT

These cases arise in the context of an economic problem that is of the utmost importance to the railroads of the United States.[1] The inflationary conditions of recent years have imposed particularly heavy burdens upon the railroads. The wages of their employees and other costs, including those for material, equipment and capital, have been rising continuously and rapidly. *Because their rates are subject to comprehensive and* detailed regulation the railroads have not been able to respond to these inflationary pressures with the same degree of promptness and flexibility that is available to unregulated businesses. This limitation on the capacity of the railroads to deal promptly with the gap between their costs and their revenues has been one

[1] The appellee railroads in this case include substantially all the Class I railroads of the United States (App. 13a-26a).

of the important causes of the critical problems that now afflict the entire industry.[2]

Between 1960 and 1967 the railroads were able to sustain their operations without any general increase in freight rates because heavy capital investments in the period yielded efficiencies that offset gradually increasing wages and other costs. In the latter part of the period, however, costs began to rise steeply and advancing technology did not produce offsetting efficiencies. In 1967 the railroads found it necessary to propose a general increase in freight rates and in 1968 the Interstate Commerce Commission permitted this increase to go into effect. *Increased Freight Rates, 1967*, 332 I.C.C. 320 (1968) (Ex Parte No. 256). Even as the Commission proceeding in Ex Parte No. 256 was in progress, however, it was apparent that inflationary pressures were such that a further increase was necessary.

On March 7, 1968, the railroads initiated the general rate increase proceeding here involved (Ex Parte 259) by a petition to the Commission (App. 226a). As a general rule carriers may initiate rates simply by filing tariffs or tariff amendments without prior approval of the Commission, the proposed rates being subject to the discretionary power of the Commission to investigate their lawfulness and to suspend their effectiveness for a limited period pending investigation. See Sec-

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[2] See generally Hearings Before the Senate Committee on Interstate and Foreign Commerce on S. 1461, 83 Cong., 1st Sess. 14-15, 40-41 (1953); Progress Report of the Domestic Land and Water Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce pursuant to S. Res. 50, 82 Cong., 1st Sess. 63-65 (1951) (Rep. No. 1039).

tion 15(7) of the Act.[3] However, when an increase affecting a vast number of rates is to be made it is impractical to comply with the technical regulations of the Commission prescribing the form of railroad tariff publications. For this reason the railroads' petition asked the Commission to waive compliance with those regulations (App. 223a). The petition also asked the Commission to modify any outstanding rate orders of the Commission to the extent necessary to permit the filing of the proposed rate increases (App. 233a).[4]

The Commission on March 8, 1968, entered an order granting the requested ministerial relief from the tariff-publication rules and modifying outstanding rate orders to permit the filing of short-form rate increase tariffs (App, 236a). The railroads were given permission to file such tariffs to be effective on not less than 75 days' notice to the Commission and the public (App. 236a).[5] Accordingly, on March 11, the railroads filed

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[3] All statutory citations, unless otherwise indicated, refer to the Interstate Commerce Act, 49 U.S.C. §1 et seq. Pertinent provisions of the Act are reprinted in the joint brief of the United States, the Secretary of Agriculture, and the Interstate Commerce Commission (pp. 56-59). Hereafter these parties are collectively referred to as "the Government."

[4] This prayer for relief was directed to two kinds of Commission orders that affected a comparatively small number of rates: (1) orders prescribing specific rates, or specific maximum rates, for particular movements of particular commodities, and (2) orders granting relief from the provisions of Section 4 of the Interstate Commerce Act which prohibits a carrier from charging more for transportation of like goods over a shorter distance than over a longer distance in the same direction on the same line and from charging through rates that exceed the aggregate of intermediate rates.

[5] The Commission's order directed that the tariffs include a provision that, in the event any increases resulting from the application of the tariffs exceeded increases subsequently approved or prescribed by the Commission, the railroads would make appropriate refunds (App. 236a-237a).

tariffs increasing freight rates generally by amounts varying by commodity and ranging from 3 to 10 percent. The Commission immediately established and thereafter followed an expeditious procedure, involving the submission of affidavits and written arguments for and against the increase and the hearing of oral argument, to assist it in deciding whether the tariffs should be suspended pending investigation (App. 239a-240a).

On June 19, 1968, shortly before the tariffs were to become effective, the Commission suspended the tariffs until January 23, 1969, but allowed the railroads to file new tariffs, to be effective on one day's notice, establishing rate increases not to exceed 3 percent, and instituted an investigation of the lawfulness of the rate increase originally proposed by the railroads (App. 239a-241a).[6] By the same order incidental Fourth Section relief was granted and other outstanding rate orders were modified to the extent necessary to permit the 3 percent general increase to be put in effect (App. 241a-242a).

By a subsequent procedural order of July 3, 1968, the Commission divided the investigation into subdockets for the purpose of hearings (App. 243a). One subdocket (Sub-No. 2) related to the railroads' costs and revenue needs, another concerned rates and charges for special services and each of the eight others concerned a group of commodities. In its order the Commission found that due and timely execution of its functions required an expedited decision and directed that there should be no recommended report

[6] The Commission's order directed that the new tariffs contain a refund provision similar to the one ordered for the original suspended tariffs (App. 241a).

by the examiners (App. 247a). Evidentiary hearings were held before four hearing examiners between September 9 and October 8, 1968. The case then was submitted to the Commission on the record made before the examiners in the several subdockets.

After receiving briefs from the parties, the Commission on November 25, 1968, issued an interim report and order vacating its suspension of the rate increases except on a few commodities (App. 274a). 332 I.C.C. 590. The rate increases authorized by the Commission became effective on November 28, 1968. On January 9, 1969, the Commission concluded the investigation by issuing its final report and order, which allowed the rates to remain in effect with some modifications (App. 281a). 332 I.C.C. 714.

In its interim report of November 25 the Commission's findings dealt primarily with costs and revenue needs, the subject of the proceeding designated as Sub-No. 2. It found that railroad operating expenses per 1,000 gross ton miles had decreased from $5.95 in 1961 to $5.58 in 1966—the period in which, as indicated above, the railroads by more efficient use of their capital had managed to hold their rates steady despite cost increases—and then had turned upward, reaching $5.96 in 1968 (App. 261a).[7] For a "constructive year," based upon 1968 traffic and second-half 1968 wage rates, materials prices and other costs projected for a full 12 months, the Commission found a unit cost of $6.05 per 1,000 gross ton miles, which is 8.42 percent above the 1966 unit cost (App. 261a).

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[7] A ton mile is a statistical convention representing the movement of a ton of freight one mile. It is used to measure productive transportation activity.

The unit cost evidence and certain other evidence as to costs and income that the Commission recited compelled the conclusion, the Commission said, that the entire increase sought by the railroads "would fall far short of meeting [their] revenue need due to increased operating costs" (App. 263a). This was based on a comparison between 1966 and the "constructive year." The Commission found 1966 to be a reasonable base year, whose use in the comparison the Commission drew was "fair to shippers" because it was a recent year but nevertheless a year whose experience was not affected by a major rate revision and a year in which traffic volume was close to the current volume (App. 263a).

In summary, the Commission found that increased expenses between 1966 and the constructive year amounted to $855 million, unaccompanied by any significant increase in traffic volume (App. 263a-264a).[8] It found that, if the full rate increase then pending were granted and yielded the revenues it was intended to yield, the railroads would still be nearly $90 million short in the constructive year of meeting the increased cost burden (App. 265a). The Commission concluded that the railroads were "in immediate need of additional freight revenue to offset, in part, their increased operating expenses . . ." (App. 265a).

The Commission also discussed the railroads' rate of return, noting, however, that its decision rested "on other grounds" (App. 265a), *i.e.*, the immediate need for more freight revenue brought on by the increase in expenses. It found that the industry's estimated return in the aggregate was 2.58 percent on net investment

[8] This increase was offset to the extent of $300 million by increases authorized in Ex Parte 256 (App. 264a).

in 1968 and its return had been only 3.90 percent in 1966 before the inflation made itself felt and that both of these were "clearly inadequate" returns (App. 267a). The railroads had presented in evidence a cost-of-capital study showing that they needed a return of 9 or 9½ percent to attract capital (App. 265a-266a). Without adopting this position the Commission found that a return "in the range of 4 per cent or less, which we have repeatedly characterized as substandard, is at least an indication that the underlying rate level is within the zone of reasonableness" (App. 267a). The Commission treated at length objections leveled by shippers against the railroads' rate of return calculations. Some it found baseless; others it agreed with, but the effect of adjusting for them was miniscule (App. 267a-273a).

The Commission's findings in its interim report were reaffirmed in its final report of January 9, 1969. In that report the Commission found, as it had previously, that the railroads had "a critical need" for additional revenues to offset, in part, increased operating costs (App. 391a). It also found that the public interest and the national defense interest "in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges . . . are permitted to be continued or to be put into effect" (App. 391a). With certain modifications, the Commission permitted the proposed increases which had been made effective in November 1968 to remain in effect (App. 395a).

In the final report the Commission also dealt with those parts of the proceeding—Sub-Nos. 3-11—in which the increased rates were considered as they applied to special services and to categories of com-

modities. The Commission made it clear, however, that in allowing the proposed increases for particular categories of commodities it was not determining the lawfullness of particular rates and that its findings that the rate increases were reasonable as applied to different types of services and categories of commodities were merely findings as to the general bases of rates and charges (App. 393a). Thus the Commission did not engage in a detailed analysis of all the facts directly associated with particular traffic as it normally does in the usual case of an investigation of a particular rate or group of particular rates. "Costs of specific commodity movements are not in issue," the Commission said (App. 285a). It also pointed out that it was not determining whether the particular rates which would result from the increases were maximum reasonable rates (App. 283a).

The Commission's approach is illustrated by its treatment of Sub-No. 3, which related to coal traffic, an important commodity in which certain of the appellants are interested. In its discussion, the Commission (1) found against the shippers' contention that there would be wholesale diversion of coal traffic to other modes of transportation and conversion to other fuels if rates on coal were increased (App. 309a-310a), (2) remarked that "should competitive situations arise, appropriate adjustments can be made by producers and carriers" (App. 310a), and (3) found that the possibility of such situations arising "furnishes no ground for exempting coal from bearing an appropriate proportion of the increased revenues shown necessary" (App. 310a).

The Commission found that overall "the increased freight rates and charges authorized herein will not

exceed a maximum reasonable level," and that the increases would "have no undue adverse effect on the movement of traffic by railway" (App. 393a). The Commission made clear, however, that its "findings as to justness and reasonableness . . . will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction" (App. 393a). Specifically, the Commission said that the increased rates were not to be "considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370," and would "in all respects, be subject to complaint and investigation as provided by the act" (App. 393a). The reference to *Arizona Grocery* means that a shipper may recover reparations with respect to any increased rate subsequently found unlawful, a right that would not be available if the rates were regarded as prescribed by the Commission. The Commission's orders thus preserved fully the right of shippers to complain against and have the Commission pass upon the justness and reasonableness of any particular rates by which they might be affected, award reparation for any past overcharge, and order an adjustment of rates for the future.

In its final order the Commission also modified its outstanding rate orders and granted such Fourth Section relief as was necessary to permit the proposed rate increases to become effective (App. 395a-397a). On the basis of its findings and the conclusions in the two orders the Commission vacated its order of suspension and discontinued the investigation proceeding (App. 395a).

The appellants, who are shippers or representatives of shippers, brought suits to enjoin and set aside the

Commission's orders. The appellants in No. 78 (Atlantic City Electric Co., *et al.*), who are shippers of coal, brought suit in the United States District Court for the Southern District of New York. The appellants in No. 106 (Alabama Power Co., *et al.*), who ship or represent shippers of a variety of commodities, brought suit in the United States District Court for the District of Columbia. The railroad appellees intervened as defendants in both cases (App. 50a, 186a).[9]

The appellants in the New York litigation attacked the Commission's order on procedural grounds alleging, among others things, that the Commission had erred by not providing for participation by its Bureau of Accounts in the administrative proceedings and by omitting to provide for a proposed report by the examiners "without stating on the record that this procedure was eliminated because of the necessity of the due and timely execution of its functions . . ." (App. 7a). These appellants also alleged that the Commission's findings, particularly as they related to coal traffic, were not supported by substantial evidence (App. 7a-9a). In its answer the Commission alleged that the Commission's orders were not reviewable and in addition denied that the actions of the Commission challenged were unlawful or improper (App. 45a-47a). At the suggestion of the court the Commission thereafter filed a motion to dismiss based solely on its defense of non-reviewability (App. 60a-61a).[10]

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[9] The State of New York and agencies of a number of states intervened as plaintiffs in the New York suit (App. 49a). The Secretary of Agriculture of the United States intervened as plaintiff in the District of Columbia suit (App. 192a).

[10] The railroad appellees did not file a separate motion to dismiss but supported the motion of the Commission (App. 70a).

On October 28, 1969, the three-judge court granted the motion to dismiss (App. 153a). 306 F.Supp. 338. Citing a line of decisions dating back to 1935, the court declared that these cases "held in substance that the court will not entertain a suit to enjoin an order of the Commission in a general revenue proceeding when the plaintiffs have not exhausted" their statutory remedy "to seek an adjustment of the particular rates which affect them" (App. 160a). The court pointed out that the plaintiffs and plaintiff intervenors could in such proceedings "achieve the relief they were really seeking, *i.e.*, a reduction in the particular rates" under which they shipped (App. 161a). It concluded that "the statute does not contemplate an attack upon the general revenue order at this stage" (App. 163a).

The appellants in the District of Columbia attacked the findings of the Commission, alleging that they were vitiated by various errors, were not supported by substantial evidence and were inadequate to support the Commission's orders (App. 179a-183a). The Interstate Commerce Commission defended the Commission's orders on the merits but did not contend that they were unreviewable (App. 204a-206a). The railroad appellees, in addition to defending the Commission's orders on the merits, also contended that the orders were not reviewable (App. 186a-191a).

The district court dismissed the complaint with one judge dissenting. The court referred to the same line of decisions relied upon by the New York court (App. 216a) and found them determinative against judicial review since express statutory remedies had not been exhausted (App. 215a). It noted also that the Commission itself in Ex Parte 259 had explicitly re-

served to all shippers the right to seek correction of any maladjustment and had stated that the increased rates "will, in all respects, be subject to complaint and investigation as provided by the act" (App. 215a).[11]

The inflationary pressures on the railroads have continued. An application for a further general increase averaging about 6 percent was filed in October 1969 and, after briefs and arguments, the increase was allowed by the Commission to go into effect in November without being suspended, subject to a further investigation to determine whether any of the increases were unlawfully discriminatory (Ex Parte 262).[12] The Commission terminated that investigation by an order dated July 16, 1970. 337 I.C.C. 436. In March 1970 the railroads proposed another increase averaging 6 percent. The Commission again received briefs and heard argument and thereafter suspended the increase to the extent that it exceeded 5 percent and ordered an investigation, which is still in progress (Ex Parte No. 265).

SUMMARY OF ARGUMENT

I.

In a general revenue proceeding such as the one here involved, the Interstate Commerce Commission determines whether general rate increases proposed by all railroads, or large groups of railroads, should

[11] The dissenting judge, although admitting "that there is little direct language in the existing cases supporting judicial review of the order now," stated that it seemed "sensible" to permit a "limited threshhold review" of the Commission's general revenue determinations while remitting shippers to their statutory remedies to determine the legality of particular rates (App. 218a-219a).

[12] The Commission's order in that case has been attacked in Manufacturing Chemists' Ass'n v. United States, D.D.C. No. 3276-69.

be permitted to become effective. It does not consider or determine whether particular rates established pursuant to the increase are just, reasonable or otherwise lawful, *Brimstone R.R.* v. *United States*, 276 U.S. 104, 122-23, but reserves such questions for later determination. The enormous number of rates and commodities involved in a general revenue proceeding, the multiplicity of parties and interests, and the time pressures created by the economic necessities of the railroad industry make it impossible to consider and make determinations with respect to particular rates. *Increased Rates, 1920*, 58 I.C.C. 220, 243; *United States* v. *Louisiana*, 290 U.S. 70, 76-77.

Following the general increase any shipper can, under Sections 13 and 15(1) of the Act, attack any particular increased rates that affect him, and he will obtain revision of those rates and reparations if the rates are determined to be unjust or unreasonable. While the shipper must pay the increased rates pending such a determination, this interim burden exists whenever a Commission order refuses to suspend a proposed rate increase and it is settled that such an order is not reviewable. *Arrow Transportation Co.* v. *Southern R.R.*, 372 U.S. 658, 670.

The shipper's only legitimate interest under the Act is in obtaining a just and reasonable rate on his shipments. The detailed data essential to this determination can only be developed in a statutory proceeding under Sections 13 and 15(1). If any determinations made in general revenue orders prove relevant in the statutory proceeding, the shipper would be free to litigate the issue and obtain judicial review on it, as well as on any other issue in the statutory proceeding. Consequently there is neither need nor justification for a

shipper to obtain judicial review of the preliminary determinations in a general revenue order, and to allow such review would be contrary to settled principles requiring the exhaustion of administrative remedies.

For more than a half century there has been no judicial review of the Commission's orders in general revenue proceedings, and since 1935 the district courts have consistently held such orders not reviewable because shippers have available effective administrative remedies. *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935); *Birmingham Slag Co.* v. *United States*, 11 F. Supp. 486 (W.D. Ala. 1935); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd per curiam*, 352 U.S. 1021. The rationale of these cases, correctly followed by the courts below, requires the shipper seeking review of a general revenue order to exhaust his administrative remedies whether he attacks the more general determinations of the Commission or limits his attack to those relating to particular commodities.

City of Chicago v. *United States*, 396 U.S. 162, and the other decisions cited by appellants are not applicable because in those cases no adequate administrative remedy existed to protect the plaintiff's substantive rights. Nor is review of the general revenue order justified as to those limited portions of the order that grant relief under the Fourth Section and from outstanding rate orders, because appellants have not alleged or shown that those provisions inflict any prejudice upon them.

As a practical matter judicial review of the Commission's general revenue determinations is likely to impose new and severe financial burdens on the na-

tion's railroad systems and thus adversely affect the national transportation policy. The Commission's orders contain refund provisions, and the process of judicial review, remand and further reconsideration may greatly prolong the period during which the railroads' refund obligation accumulates. Because of the unsettled state of the law as to the effect of judicial review on the application of the refund provisions, there is a serious risk that at the end of years of litigation the railroads might be required to refund the entire amount of the increase even though there was no determination that any particular increased rate was unjust and unreasonable. The very risk of this vast contingent-liability may severely impair the railroads' capacity to raise capital, to make investments and to make forward plans for the conduct of their business.

There is also a grave risk that the effectiveness of general rate increases would be substantially delayed by a district court's grant of interlocutory relief pending the completion of judicial review. Because of the wide geographic scope of general revenue determinations and the multitude of rates and shippers affected, it is likely that review proceedings would be brought in numerous district courts and that in many instances interlocutory relief would be granted. During the period of interlocutory relief the railroads might suffer large losses which can never be recouped even if the Commission's determinations are ultimately sustained on review and even though there is never a determination that any particular increased rate is unjust and unreasonable.

II.

If the Commission's orders are held to be reviewable, then this Court should affirm the orders on the merits. Immediate review by this Court is feasible because

appellants' attacks do not raise issues that require an examination of the evidentiary record, and such a prompt determination of the validity of the Commission's orders would serve the interests of both the railroads and the shippers.

The Commission's finding that the revenues from the proposed rate increase would themselves fall short of recent increases in the carriers' expenses is supported by substantial evidence and provides a reasonable basis for the Commission's decision to allow the rate increase to become effective. Having found the increase justified by this imbalance, the Commission was not required to make findings on expenses in future years or as to future capital needs of the railroads which the record showed could not reasonably be expected to decrease. The Commission gave to the railroads' rate of return only such weight as it deserved on the basis of the record.

Since the Commission was not required and did not purport to determine that any particular rate resulting from the increase was just and reasonable, *United States* v. *Louisiana*, 290 U.S. 70, it was not required to make findings, as urged by the appellants, with respect to unit costs on particular commodity movements or commodity groups, prejudice as to particular regions, and other questions appropriately reserved for statutory proceedings directed to the level of particular rates. For many years this Court has held that it is proper in large scale proceedings for the Commission to make determinations as to groups of railroads on the basis of typical evidence. *New England Divisions Case*, 261 U.S. 184; *United States* v. *Louisiana*, 290 U.S. 70; *Chicago & N.W. Ry.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 326.

ARGUMENT

I. THIS COURT SHOULD ADHERE TO THE ESTABLISHED RULE THAT ORDERS OF THE INTERSTATE COMMERCE COMMISSION MADE IN A GENERAL REVENUE PROCEEDING ARE NOT REVIEWABLE AND THAT SHIPPERS MAY VINDICATE THEIR RIGHT TO LAWFUL RATES BY RESORT TO THE REMEDIES EXPRESSLY PROVIDED BY THE INTERSTATE COMMERCE ACT.

A. The Nature of General Revenue Proceedings Makes Judicial Review Inappropriate.

For more than 60 years the Commission has found it necessary to conduct general revenue proceedings to consider whether a general rate increase proposed by all the railroads in the country, or all of the railroads in a region, for the purpose of offsetting increased costs of operation, should be allowed to become effective. These proceedings necessarily involve an enormous number of rates, a multiplicity of parties, interests and contentions and complex problems of general regulatory policy and are often conducted under time pressures created by the economic necessities of the railroad industry. Because of these considerations the Commission has long recognized that in a general revenue proceeding it cannot determine the legality of any particular rate but can only make a preliminary determination that rate increases of a specified general magnitude should be allowed, subject to a subsequent determination of the legality of those increases as they might apply to particular movements of particular commodities.

Thus in 1920, in one of the earliest general revenue proceedings, the Commission said:

> "It would be desirable, if it were possible, to determine definitely the commodities, the sections of the country, and even the individual rates which can best bear the burden of increases, and the re-

> lationships of the rates and differentials which will be disturbed by a percentage increase. This is precluded by the necessity of prompt action upon the main issues presented." *Increased Rates, 1920*, 58 I.C.C. 220, 243 (1920).

Again, in *New England Divisions*, 66 I.C.C. 196, 203 (1922), the Commission explained that "in all . . . general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the Commission reduced to a state of administrative paralysis."

This Court long ago recognized the special limitations and characteristics of general revenue proceedings when it said in reference to such proceedings in the *New England Divisions Case*, 261 U.S. 184, 196-97: "[I]t was the actual necessities of procedure and administration which had led to the adoption of that method [of proceeding on 'evidence deemed typical of the whole rate structure'] in passing upon the reasonableness of proposed rate increases." See also *Chicago & N.W. Ry.* v. *Atchison, T. & S.F. Ry.*, 386 U.S. 326, 341. In *United States* v. *Louisiana*, 290 U.S. 70, 76-77, the Court again recognized that general revenue cases are *sui generis* in the scheme of ICC regulation of railroads when it said that

> "In performing the duty broadly to increase carrier revenue, it is enough if the Commission, in the first instance, makes such inquiry and investigation as would enable it to say that the prescribed increases when applied to members of the group will generally not exceed a reasonable maximum. The extent of this inquiry and the detail of in-

vestigation cannot be marked by this Court with certainty. The size of the group dealt with, the nature of the traffic, the urgency of the relief demanded, these and other factors should condition the Commission's procedure in each case."

It follows from the very nature of the general revenue proceeding that the Commission's findings and determinations in such a proceeding are no more than a first step in answering the ultimate question posed by the statute, *i.e.*, whether individual rates on particular movements are just and reasonable. At this interim stage in the rate-making process the Commission limits itself to making "such inquiry and investigation" as enables it to determine that the increases "will generally not exceed a reasonable maximum" level. This determination is in no sense a final adjudication that the application of the general increase to the movement of particular commodities satisfies the shipper's right to a just and reasonable rate.[13] *Brimstone R.R. v. United States,* 276 U.S. 104, 122-23.

In a general revenue proceeding the Commission protects and preserves the shipper's rights to just and reasonable rates, as it did here, by making it plain in its order that the shipper retains his full array of statutory remedies to vindicate those rights. Thus under Sections 13 and 15(1) the shipper is entitled

[13] The particular rates published by a railroad following a general revenue proceeding are therefore merely carrier initiated rates, not rates that the agency has prescribed or otherwise determined to be just and reasonable. The distinction between carrier-made and agency-made rates was recently illustrated in Moss v. CAB, D.C. Cir. No. 23627, July 9, 1970, where on the particular facts, the court found the agency order reviewable because in effect it prescribed rates (pp. 15-16).

to obtain a determination on the lawfulness of the particular rates applicable to the commodities he ships. And if those rates are determined to be unjust, unreasonable or otherwise unlawful then the shipper is entitled to reparation for the past under Section 16 and to the establishment of lawful rates for the future.

A shipper who is remitted to his statutory remedies will pay the increased rate on his shipment pending a Commission determination on the legality of those particular rates, but that fact does not alter the intermediate character of the determinations of the Commission in a general revenue proceeding. The shipper's right to a lawful rate on his shipments is unimpaired by those determinations and, if it is finally decided that the increased rate is unlawful, he can obtain by way of reparation redress for the interim burden. This interim burden is in no significant respect different from the interim burden that is imposed upon a shipper by a Commission order refusing to suspend a proposed rate increase and the courts have consistently recognized that such an order is merely an intermediate step in the rate-making process, that it does not finally adjudicate the rights of the shipper, and that it is not subject to judicial review. See *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 670; *Long Island R.R.* v. *United States,* 193 F. Supp 795, 797-98 (E.D.N.Y. 1961).

In addition to the fact that neither an order refusing to suspend rates nor the determinations made by the Commission in a general revenue proceeding decide the legality of particular rates there is an additional relevant similarity between the two actions. An order refusing to suspend rates is in substance a tentative administrative judgment that there is reasonable

ground to believe that the rate or rates in question as increased will fall within the zone of reasonableness, so that no further direct intervention by the Commission is necessary in advance of the shipper's resort to his statutory remedies. The Commission's determinations in a general revenue proceeding are a similar tentative administrative judgment, even more general in character, that the generality of the thousands of rates involved as increased will fall within the zone of reasonableness so that no further direct intervention by the Commission is necessary in advance of the shipper's resort to statutory remedies to test the legality of the increase as applied to his shipments.[14] Such a preliminary predictive evaluation, based on Commission expertise and the limited proofs available absent a full hearing on individual rates, is not the kind of agency determination that courts normally review when there is available an alternative proceeding which would be directed to more specific issues, would fully protect the rights of interested parties, and would produce a final and specific administrative judgment more suited for judicial review. *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594; *Toilet Goods Ass'n* v. *Gardner,* 387 U.S. 158.

Although judicial review of Commission findings and determinations in a general revenue proceeding is not required to protect the statutory right of the shipper

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[14] In his concurring opinion in Increased Rates, 1920, 58 I.C.C. 220, 258, Commissioner Eastman noted the analogy between a general revenue proceeding and a suspension case:

> "If the rates prove unduly high, they may later be reduced. The present proceeding has nothing of finality about it and in many respects is similar to a suspension case, where the question is whether or not certain proposed rates shall be permitted to take effect without suspension, a matter left by the act to the discretion of the Commission."

to a just and reasonable rate, that review as a practical matter is likely to inflict substantial prejudice on the railroads for which they have no redress. As we shall show at pp. 35-40 below, this intervention could create a grave danger that the railroads would be deprived for substantial periods of time of the benefits of a general rate increase as applied to thousands of particular rates even though those rates as increased were unquestionably just and reasonable.[15] This result might indeed follow from litigation instituted by shippers who had a direct interest in only a limited number of commodities. And no statutory remedy by way of refund, reparation, or accounting order exists to compensate the railroads for the consequent losses.

The considerations of principle and policy discussed above lead to the conclusion that the Commission's determinations in a general revenue proceeding should not be subject to judicial review in advance of a shipper's resort to the specific statutory remedies that enable him to test the legality of the particular rates applicable to his shipments and, as shall be shown in the next section, the courts have for many years uniformly applied this rule.

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[15] In the past even in the absence of judicial review the railroads have suffered very substantial revenue loss due to the time lag involved in general revenue proceedings. It has been estimated that, "'as a result of the delays'' in the period 1946-52 in instituting increases sought in general rate increase cases, the railroads lost gross revenues of about $1.4 billion. Hearings, supra p. 3, n.2, at 43. The record in this case indicates that the delays in allowing the increase sought cost the railroads approximately $200 million. This figure is based on the estimated loss of $466 million per year between the filing of the application and the 3 percent interim increase allowed on June 19, 1968 (over three months), and on the estimated loss of $200 million per year between that interim increase and the increase allowed in November 1968 (over five additional months) (see App. 264a-265a).

B. The Courts Have Uniformly Held That General Revenue Orders Are Not Reviewable Because Shippers Have Adequate Statutory Remedies with Respect to the Particular Rates That Affect Them.

The considerations discussed above—the necessary tentativeness of the general revenue order and the availability of the statutory remedies—underlie the uniform decisions of three-judge district courts since 1935 denying judicial review of orders entered in general rate increase cases and holding that shippers dissatisfied with increased rates should pursue their available administrative remedy to attack the particular rates applicable to their shipments.

The foundation case is *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va. 1935). The court there held that an order permitting the railroads to institute selective rate increases born of the depression was not subject to review because the Section 13 complaint remedy was available to shippers. Essentially the same result was reached in *Birmingham Slag Co.* v. *United States,* 11 F. Supp. 486 (W.D. Ala. 1935).

When about twenty years later judicial review was sought of a general rate increase that occurred during the Korean War, *Algoma* was followed in *Koppers Co.* v. *United States,* 132 F. Supp. 159 (W.D. Pa. 1955). This result was reached despite the intervening abrogation of the negative order doctrine in *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, and the enactment in 1947 of the Administrative Procedure Act which liberalized judicial review.[16] The rationale for

[16] Now codified in various sections of 5 U.S.C. Pertinently, see 5 U.S.C. §§702, 704.

requiring shippers to exhaust their statutory remedies was well stated in the *Koppers* case:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15 has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits." 132 F. Supp. at 163.

In the period since *Koppers*, the approach embodied in it has been followed by each court that has confronted the question. The decisions include *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd per curiam*, 352 U.S. 1021; the decisions of the two district courts here under review; and, most recently, the decision of a differently constituted three-judge district court in the District of Columbia in *Electronic Industries Ass'n* v. *United States*, 310 F. Supp. 1286 (D.D.C. 1970).[17]

Those seeking reversal in this case attempt to discredit or distinguish *Algoma* and the cases following

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[17] That decision, arising from a suit to review Ex Parte 259 by shippers interested in electronic components, has been appealed by them to this Court (No. 423, Oct. Term 1970). In that case the shippers have concentrated their attack on the specific rates on such products (see p. 27, n. 18, infra).

it on a number of grounds. Their arguments are not persuasive. The Government, for example, argues that *Algoma* if read to support the decisions below has been outmoded by later decisions (br. 38). In particular, the Government contends that the *Algoma* opinion "was permeated with the now discarded notion that because agency action is permissive, it is not subject to review" (*id.*). Similarly, the *amicus curiae* brief of the National Industrial Traffic League (pp. 10-11) accuses *Algoma* of "incorrectly attempt[ing] to make a distinction between rates prescribed and permitted by the ICC." The thrust of these contentions seems to be that *Algoma* is undercut by the abandonment in *Rochester Telephone* and other decisions, and in the Administrative Procedure Act, of any distinctions between affirmative and negative orders and between agency action and refusal to act.

This argument misconceives the basis of the decision in *Algoma*. As the opinion in that case makes clear the decision did not turn on any distinction between affirmative and negative orders; indeed the court did not even cite or discuss the leading cases that gave rise to the negative order doctrine, *e.g.*, *Proctor & Gamble Co.* v. *United States*, 225 U.S. 282. The true and explicit basis of the *Algoma* decision was that the Commission's order did not determine the lawfulness of particular rates and that consequently the plaintiffs should exhaust the administrative remedy provided by statute for the determination of the lawfulness of the particular rates applicable to them. 11 F. Supp. 493-94, 496. The court's discussion in *Algoma* of the permissive character of the Commission's order and of the long established and admittedly correct distinction between rates prescribed and rates permitted by the Interstate Commerce Commission was merely designed to show that particular rates had not been

prescribed by the Commission in that instance and that administrative remedies as to particular rates remained available; the fact that rates have not been prescribed and that Sections 13 and 15(1) relief is still available are matters not even disputed in this case. Nothing in *Rochester Telephone*, the APA, or any other cited authority purports to remove or qualify exhaustion of administrative remedies as a prerequisite to judicial review, and the policies that led to eschewing technical distinctions regarding the form of orders are not in any way addressed to the substantive requirement that avenues of administrative redress be exhausted before resorting to the courts.

A second line of criticism, emphasized by the shipper appellants, is that *Algoma* and certain of the other decisions which followed it involved attacks on particular rates increased by the general rate order, whereas in the present cases there are involved challenges to the "bases for the general increase and not to the application of the increase to specific rates," as appellants in No. 106 *(Alabama Power)* phrase the point (br. 20). The Government also emphasizes the distinction, arguing that if *Algoma* is read narrowly, it determines only that attacks upon specific rates are impermissible before resort to statutory remedies.

We agree with the Government that there should be no judicial review when the attack is directed against the application of the increase to particular commodities or movements.[18] Such an attack raises issues that are substantially identical to those that

[18] Such a case is Electronic Industries Ass'n v. United States, No. 423, Oct. Term, 1970 (see p. 25, n. 17, supra). There, the district court said that "the plaintiff's whole complaint boils down to an assertion that the increase in rates for shipping electrical products is discriminately high and without a rational cost basis" (Jur. St., No. 423, p. 4a).

the shipper would normally raise if he pursues his statutory remedy under Sections 13 and 15(1) of the statute. And since the Commission in a general revenue proceeding does not, and need not, determine the lawfulness of particular rates, *Brimstone R.R.* v. *United States,* 276 U.S. 104, 122-23; *United States* v. *Louisiana,* 290 U.S. 70, and did not do so here, it would be incongruous to require judicial review directed to that issue.

However, conceding for present purposes that attacks on the general revenue order directed against specific rates cannot be reviewed now, it does not follow that more broadly framed complaints against the order are entitled to by-pass available administrative remedies. The contrary contention appears to rest on the unjustified assumption that in a proceeding directed to the lawfulness of the particular rates the shipper could not raise issues directed to the general revenue findings and determinations of the Commission. As we shall show at pages 42-48 below, the shipper's statutory remedies permit him to raise in a statutory proceeding before the Commission attacking particular rates any relevant issue that arises out of the Commission's more general determinations in a general revenue proceeding, and thereafter to obtain judicial review of those determinations insofar as they are a basis for the Commission's decision in the statutory proceeding. The district court in No. 78 (*Atlantic City Electric*) recognized the significance of this fact. There it was urged that the attacks of the shippers were less directed to specific rates than was true in earlier cases such as *Algoma,* but the court correctly held that *Algoma,* and the cases following it, precluded review now, whether the complaint was read as attacking particular rates or the general revenue determinations of the Commission (App. 161a). In

reaching this conclusion the court pointed out that objections to the general determinations of the Commission could be raised in a proceeding directed to the legality of particular rates and that the Commission's rulings on those objections in such a proceeding would thereafter be subject to judicial review (App. 163a).

Finally, the *amicus curiae* National Industrial Traffic League contends that "*Algoma* is premised on the failure of the Commission to suspend the rates, 'a matter within the administrative discretion of the Commission, not now reviewable in the courts' " (br. 11). This argument overlooks the fact that the Commission proceeding involved in *Algoma* (*Emergency Freight Charges, 1935,* 208 I.C.C. 4, (Ex Parte No. 115)), was essentially a general revenue proceeding. The evidence, the arguments presented to the Commission, and the Commission's determinations in that proceeding were all essentially the same as in any general revenue proceeding. The Commission's refusal to suspend in that case allowed the rate increases to become effective, but that is precisely the effect of the Commission's order here. There is therefore no rational basis for saying that the rule that the shipper must first resort to his statutory remedies was more applicable in *Algoma* than it is here.[19] In any event the ground of dis-

[19] The suggestion that the decision in *Algoma* rested basically on the ground that the court had no power to review a refusal to suspend rates is belied by the court's opinion there. The court rested its decision on the broad ground that the plaintiffs had not exhausted their administrative remedies with respect to the particular rates applicable to them. 11 F. Supp. 493-94. It discussed the reviewability of the Commission's refusal to suspend rates merely for the purpose of showing that the fact that the plaintiffs had no administrative remedy with respect to this particular aspect of the Commission's action was immaterial because the power of suspension had been committed by Congress to the discretion of the Commission. Id. at 495.

tinction urged is not available with respect to the *Koppers* case, where the Commission's order followed an investigation conducted pursuant to Section 15(7) (see *Increased Freight Rates, 1951,* 280 I.C.C. 179, 188 (Ex Parte 175)), just as it is not available as to any of the three decisions declining to review attacks on Ex Parte 259.

Two recent decisions of this Court are also alleged to be inconsistent with the *Algoma* line of cases: *City of Chicago* v. *United States,* 396 U.S. 162 and *Abbott Laboratories* v. *Gardner,* 387 U.S. 136. Neither decision, of course, involved reviewability of ICC general revenue orders and in each case there existed a compelling basis for allowing immediate judicial review of administrative determinations that does not exist in the present case.

In *City of Chicago,* the Court held that a refusal of the Commission to prevent the discontinuance of passenger train service was immediately reviewable at the behest of those seeking its continuance. Quite unlike the present case, there was no further avenue of administrative relief for the protestants, let alone one that provided, as here, complete protection of their rights on a fully developed record.[20] As the Court made clear, the Commission's decision amounted to an adjudication of "the merits" (396 U.S. at 166) and in such circumstances the form of the Commission's order did not prevent judicial review.[21]

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[20] In Barlow v. Collins, 397 U.S. 159, and Association of Data Processing Service Organizations, Inc., v. Camp, 397 U.S. 150, no further administrative remedy was available.

[21] The appellants in Number 78 (*Atlantic City*) (br. 10) cite this Court's statement in *City of Chicago* that when in an investigation under Section 15(7) the Commission "finds the proposed rates

In *Abbott Laboratories*, the Court permitted review of Food and Drug Administration regulations which, if not then subject to immediate review, placed the parties subject to them in an intolerable position. Compliance with the regulations would have involved substantial irreparable damage: as the Court said, "to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies" (387 U.S. at 152). The alternative course of non-compliance "would risk serious criminal and civil penalties for the unlawful distribution of 'misbranded' drugs" (*id.* at 153). Consequently to require the parties to await enforcement proceedings against them in order to challenge the administrative determination offered them no adequate administrative remedy.[22] In the present case, the administrative remedy prescribed by statute is entirely adequate (see pp. 42-48, *infra*), and—as we shall next show—judicial intervention before that remedy is utilized creates substantial danger of irreparable injury to the railroads.

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lawful" its order is reviewable. 396 U.S. at 166 n.5. This is a reference to orders determining the lawfulness of particular rates. This is demonstrated by the Court's citation of Cooper-Jarrett, Inc. v. United States, 266 F. Supp. 318 (W. D. Mo. 1964), aff'd, 397 U.S. 6, which involved just such a determination that specific rates were lawful. In the instant case the Commission did not determine that particular rates were just and reasonable.

[22] Cf. Frozen Foods Express v. United States, 351 U.S. 40, where it was held that a party affected by an order laying down rules that could be made the basis of enforcement proceedings need not wait the institution of such actions before challenging the order.

C. The Proposed Alteration of the Long Settled Rule Relating to Judicial Review of the Commission's General Revenue Determinations Is Likely To Have Practical Consequences That Will Impose New and Unjustified Financial Burdens on the Nation's Railroad Systems.

The elaborate efforts of the Government and the appellants to distinguish the array of decisions rejecting immediate review of general rate orders cannot obscure a salient point of fact: In the more than half a century that general revenue orders have been issued, the kind of premature review sought by the shippers has in fact never occurred. The Government candidly admits (br. 50) that if the appellants prevail in this instance, this "would in practical terms amount to *the establishment of a new kind* of ICC review proceeding with broad geographical application . . ." (emphasis added).

This procedural innovation is likely as a practical matter to impede the railroads in the exercise of their statutory right to initiate just and reasonable rates with the result that they may suffer large losses of revenue to the detriment of their already unsatisfactory financial condition. In considering what amounts to a novel and fundamental alteration in the procedures for review of Commission orders this Court is entitled to consider the practical consequences. See, *e.g., Swift & Co.* v. *Wickham,* 382 U.S. 111, 124-29.

One practical consequence that may result from immediate judicial review of the interim determinations made by the Commission in a general revenue proceeding is that the railroads may be ordered to refund vast amounts of money which they have collected from rates that have never been determined to be unjust or unreasonable and that may in fact be law-

ful under the rate-making standards of the Act. This is a matter of real concern to the railroads.

The Commission's orders in general revenue proceedings normally include refund provisions, as they do here (see p. 4, n. 5 and p. 5, n. 6, *supra*). In the absence of judicial review, however, the potential adverse impact of these provisions upon the railroads is limited in at least two respects. The Commission itself has sought in recent years to mitigate the likelihood and the scope of any refund by authorizing increases by stages as it concludes that particular parts of the increase sought have been justified; it has also attempted to expedite general revenue proceedings so that the period during which any refund obligation may accrue before its final order is limited.

The possibility of numerous suits in any number of district courts attacking general revenue orders—suits as to which no statute of limitations applies (see Gov. br. 50)—creates new and serious problems. Since there has never before been judicial review of general revenue orders the law with respect to the effect of that review on the railroads' obligation under the refund provisions of the Commission's orders is unsettled and uncertain. Whether and to what extent refunds might be required if the Commission's orders in a general revenue proceeding are set aside and remanded for further consideration will be affected by a variety of considerations including, among others, the nature of the infirmity the court finds in the Commission's determinations, the terms of the court's remand, the nature of any action that the Commission may take following judicial review and the correct interpretation of the terms of the refund provisions of the Commission's orders.

As a result of these uncertainties there is grave risk that there will be a substantial extension of the time during which the obligations of the railroads under the refund provisions will accumulate. At the end of the extended process of review, remand, reconsideration by the Commission, and possible further judicial review, the railroads may well be faced with the requirement that they refund enormous amounts of money collected from rates which have never been determined to be unjust and unreasonable. In this respect the railroads' position will be radically different than it has been in the past when the accumulation of the amounts that they may be required to refund has been confined to the more limited period of time involved in the Commission's proceedings. The potential liability of the railroads in this respect is also radically different from their potential liability under the reparation provisions of the statute because that liability depends upon a valid determination that particular rates are unjust and unreasonable.

Even if no refunds were ultimately directed in an individual general revenue case, the very risk of them during years of litigation over a single general revenue order creates grave problems for the railroads. The railroads' ability to raise capital, to make investments in improved equipment and facilities, and to make forward plans for the conduct of their operations would be severely and adversely affected if their rate revenue were subject to such a vast contingent liability.[23]

[23] Under the Act the railroads must assume the risk that, even after tariffs have gone into effect, increased rates may be subject to attack in individual reparations proceedings. However, as a practical matter the very limited number of instances in which individual rates would finally be found unjust and unreasonable makes this ongoing risk incomparable with the risk of being required to refund some or all of a general rate increase.

The sums at risk in general revenue proceedings are enormous; the increase in this one alone involves nearly a half billion dollars a year (App. 265a). To prolong uncertainty for an indefinite period about the disposition of such sums is a critical obstacle to effective planning by the railroads, and thus to a sound national transportation system.

The second adverse consequence that is likely to result from immediate judicial review of the Commission's tentative determinations in a general revenue proceeding is that the effectiveness of general rate increases would be substantially delayed by the district courts' grant of interlocutory relief pending the completion of judicial review—a period that may be substantial.

This delay could occur even though the Commission's general revenue determinations were ultimately held to be valid; it would occur at the instance of complaining shippers who had made no showing that the specific rates applicable to their shipments were unlawful; and it could operate to suspend the effectiveness of increased rates in which the complaining shippers had no interest whatsoever. This delay would increase the existing gap in time between the point when the railroads suffer the burden of the increased costs and the point when they can mitigate that burden by raising their rates. Unlike shippers, the railroads are not protected by the reparation power of the Commission or by tariff provisions for refunds, or by any other device; their revenue loss is truly irreparable. As noted, that time gap is already serious and for many years has been a matter of grave concern to the railroads. (see p. 23, n. 15, *supra*).

The Government appears to recognize the existence of this problem and the practical difficulties that it

would create but attempts to dismiss the matter by asserting that it is "irrelevant" and "hypothetical," and by making certain palliative suggestions (br. 39-41, 51). The argument that the problem is irrelevant is directly contrary to the broad and sensible approach the courts have long taken in construing regulatory statutes. In determining the stage of the administrative process at which agency action is reviewable a court is not required to close its eyes to experience by ignoring the relationship that exists in fact between reviewability and the risk that interlocutory relief will interfere with the orderly and effective administration of the regulatory statute. See *Long Island R.R.* v. *United States*, 193 F. Supp. 795, 799 (E.D.N.Y. 1961).

The Government's characterization of the problem as "hypothetical" is equally remote from reality. A suit to review or set aside a Commission order may be brought in any one of the more than 90 district courts in the United States. A general revenue proceeding affects thousands of commodities and thousands of shippers located throughout the United States. If it is now decided for the first time that the Commission's determinations in such proceedings are reviewable the possibility of numerous suits in different district courts attacking those determinations cannot be dismissed as conjectural or improbable.[24] The suits would be heard by panels of different judges; the shippers, commodities and other facts involved, and the contentions presented, would vary from case to case; and local interests would probably be affected. Given these facts, any assumption that shippers would not seek and in

[24] The Government itself admits that because of the "broad geographic application" of the Commission's general revenue determinations "in future cases involving general revenue orders" a number of courts may be involved (br. 50).

many instances obtain interlocutory relief simply rejects the teachings of experience.

The Government cites cases which it asserts prescribe "stringent standards" governing the granting of interlocutory relief (br. 46). As abstract propositions, these standards are unexceptionable but they are necessarily stated in terms so general that they leave an extremely wide area for discretion in their application in particular cases. A review of the decisions in which these standards have been applied shows that there is no uniformity of view on their precise content or on the relative importance of the different criteria that they lay down to guide the exercise of discretion.[25]

In these circumstances the Government's assurance that the power of the district court to grant interlocutory relief will be "sparingly" employed is meager comfort (br. 39). It is significant that the appellants do not join in this assurance. It would hardly be reasonable to expect them to do so because from the point of view of the interests they represent a substantial possibility of interlocutory relief is one of the more significant advantages of judicial review.[26]

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[25] See the discussion of the relevant cases in Jaffe, Judicial Control of Administrative Action 689-97 (1965). Speaking of the standards the author says that "it is true of them as of so many formulas that they are approximations. Particular situations have begotten answers which emphasize one of the criteria at the expense of the other." The author points out, for example, that although one of the criteria requires the plaintiff to show that he is likely to prevail on the merits, in fact "a showing of likely success is not universally demanded." Id. at 694.

[26] It is instructive to compare the Government's discussion of the problems of interlocutory relief with the discussion found at pages 25-27 of the brief of appellants in No. 78 (*Atlantic City Electric*). The comparison suggests that those appellants do not share the Government's belief that district courts will be or should be niggardly in granting interlocutory relief.

Apparently recognizing that interlocutory relief is more than "hypothetical," the Government itself suggests that as a condition to granting interlocutory relief the district court might impose "a requirement that shippers pay the increased rates into a fund under the control of the court, which the court could then order disbursed to the shippers or the railroads, depending upon the outcome of the suit". (br. 41). The Government then adds that the adoption of this suggestion "might well be preferable to imposing upon shippers the burden of collecting reparations from the railroads in a case where their likelihood of success was relatively strong" (br. 41).[27]

The Government's suggestion that shippers pay the increased rates into the treasury of the court is made with such blithe disregard of the immense practical problems involved that it well illustrates the dangers of *ad hoc* innovations in the statutory scheme. If this condition should be applied only to the shippers of a commodity before the court, the result that would follow from the court's enjoining the railroads' increase as to that commodity would be that other shippers shipping the same commodity would pay lower rates. If the condition were made applicable to all shippers throughout the United States who would be affected by a general

[27] The Government's qualification limiting this condition to "strong" cases is illusory. In the very nature of things a court can hardly make a careful and considered appraisal of the voluminous record and of the numerous and complicated questions involved in a general revenue proceeding on an application for interlocutory relief which normally must be decided quickly and on the basis of preliminary briefing and argument. As has been pointed out above (p. 37, n. 25), there is no agreement among district courts on how strong a showing a plaintiff must make to obtain interlocutory relief.

revenue order, highly complex questions would be presented as to the court's jurisdiction over the thousands of absent shippers. Finally, despite their vague recognition that the "feasibility and mechanics" of the scheme might present difficulties (br. 41), it seems questionable whether the authors of the suggestion have considered the enormous administrative and accounting problems that its adoption would impose upon a district court.

The danger that the effectiveness of general rate increases will be delayed by interlocutory relief is not removed by the Government's other palliative suggestion, which is that review of general revenue orders should be confined to one or a small number of district courts (br. 51). For both legal and practical reasons it is unlikely that the Government's suggestion could limit the number of reviewing courts to any degree that would significantly reduce the risk of interlocutory relief.[28]

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[28] Under 28 U.S.C. §1398(a) plaintiff has the statutory right to bring suit to review a Commission order in any district in which he is resident or has his principal place of business. It has been held that because of this statutory right a district court can not exercise its authority under 28 U.S.C. § 1404(a) to transfer the suit to another district court in which the plaintiff has no residence or place of business. New York Central R.R. v. United States, 200 F. Supp. 944 (S.D.N.Y. 1961).

It is unlikely that on review of a Commission general revenue order the Government's suggestion that proceedings in some district courts be stayed pending the completion of proceedings in others could be effectively carried out. The general revenue determinations of the Commission would raise a multiplicity of issues which would likely be attacked on various grounds by different shippers. The courts are properly reluctant to exercise their discretionary power to stay proceedings pending the completion of proceedings in other jurisdictions so long as there is any difference between the issues and the interests of the parties involved in the

The arguments and suggestions of the United States addressed to the question of interlocutory relief do not remove the basic problem. They merely serve to emphasize that a decision holding that the determinations of the Commission in a general revenue proceeding are immediately reviewable, in advance of any determination of the legality of the particular rates, will introduce new elements of confusion, complexity and delay in the administration of the rate-making provisions of the Interstate Commerce Act and that these consequences will have a serious adverse financial effect upon the railroads.

These practical consequences discussed above cannot properly be regarded as relevant merely to the private interests of the railroads. The economic health of the nation's railroads is a matter of concern to all shippers and to the public generally because of its direct relationship to the ability of the railroads to provide the "safe, adequate, economic and efficient" transportation service contemplated by the Declaration of National Transportation Policy (49 U.S.C. preceding §1). It is therefore appropriate for the Court to consider those consequences in determining whether to change the established rules of judicial review and, for the first time, to require immediate review of the interim determinations made by the Commission in a

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different proceedings. See New York Central R.R. v. United States, 200 F. Supp. 944, 950-51 (S.D. N.Y. 1961).

Moreover, applications for temporary restraining orders and for preliminary injunctions are normally made and decided at the very outset of the litigation before the court would have any adequate opportunity to consider and decide a motion to transfer, if transfer were permissible, or a motion to stay proceedings pending the completion of proceedings in other jurisdictions. For that reason neither of these procedural devices is likely to substantially reduce the risk of interlocutory relief.

general revenue proceeding. It is particularly important that those consequences should be considered in relation to the plan of rate regulation adopted by Congress and the balance that the plan provides between the rights and remedies of shippers, on the one hand, and those of the railroads, on the other.

In the Act, Congress recognized that railroads should be free to initiate rate changes with a reasonable degree of promptness and flexibility to meet increases in costs and other changing conditions. It therefore provided that in general the railroads might initiate rate increases without prior Commission approval. At the same time, however, it provided that once a tariff becomes effective the railroads are bound by the rates stated therein even if a higher charge would be just and reasonable under the statutory standards. In contrast the published tariff is not definitively binding on the shippers who may, by resort to statutory remedies, collect reparations for the past if published rates are shown to have been unreasonably high or otherwise unlawful.

This balance between the interests of the railroads and the shippers is not attained, however, until a proposed rate increase becomes effective. Congress therefore provided that there should be no unlimited or indefinite delay in the effectiveness of a proposed rate change. It authorized the Commission to suspend proposed rate changes but specifically provided that at the end of seven months the rates should become effective. Section 15(7). Thereafter the statutory plan contemplated that the shipper is protected by statutory provisions for reparation where he shows that the particular rates applicable to his shipments are unlawful. Immediate judicial review of the Commission's interim

determinations in a general revenue proceeding—determinations that do not decide the legality of particular rates—will disturb the balance achieved by Congress in this regulatory plan by putting in hazard the right of the railroads to retain the revenue from rates contained in published tariffs even though those rates have not been determined to be unjust and unreasonable, and by creating the possibility of prolonged delays in the effectiveness of rate increases beyond the point in time contemplated by the statute.

It is submitted that an alteration in more than 50 years of administrative and judicial practice that threatens to have these drastic effects on the practical application of the regulatory plan is one that should only be instituted by Congress. In that event, assuming that at this juncture the Congress were persuaded the change would be wise, at the very least it could consider accompanying the change by other procedural or substantive amendments to the law that would serve to maintain the balance that the Act was intended to achieve.

D. The Shippers' Statutory Administrative Remedies Are Fully Adequate to Protect Their Rights under the Interstate Commerce Act.

Rail carriers are bound by the Interstate Commerce Act to publish, charge and collect rates that are just and reasonable, not unjustly discriminatory and not unduly preferential or prejudicial. Shippers and others affected by railroad rates have the means of enforcing these statutory duties by complaining against carrier rates under Sections 13 and 15(1) of the Act; in such proceedings shippers can obtain establishment of lawful rates for the future and can collect reparations for

any past unlawfulness. Section 16. The Act makes it the Commission's duty to entertain any complaint within its jurisdiction. Section 13(1). Unless satisfied, a complaint undergoes investigation and results in a determination whether a challenged rate is just and reasonable and, in some cases, where the rate is found unlawful, the prescription of a lawful rate. A Commission decision in a complaint case is unquestionably subject to judicial review.

Nevertheless, the appellants and the Government insist that these statutory remedies are not adequate. The burden of their arguments seems to be that in a complaint case the Commission's general revenue determinations would necessarily be prejudicial to the shipper and that he would be precluded from attacking those determinations because the Commission would not reconsider them.[29] This argument is unsound as can be shown by an analysis of the conditions that would actually exist in proceedings involving particular rates.

It should be emphasized at the outset that the determinations made in the general revenue order may have no impact at all upon the arguments a shipper may wish to make to show that rates on his shipments are not lawful. For example, the evidence in the complaint proceeding, including evidence relating to ex-

[29] The appellants in No. 78 (*Atlantic City Electric*) contend that the §13 remedy is inadequate because "appellants are seeking redress from the *Commission*, not from any carrier" (br. 16). All that the *Atlantic City Electric* appellants mean by this is that they believe the Commission erred in its handling of the general revenue case and that its errors should be corrected. But, of course, it is only if and to the extent that the errors resulted in higher rates payable by the appellants that the appellants are hurt, so that they do ultimately seek redress against the carriers for their rates.

perience under the rate increases, may remove the basis for any objection to the general revenue order's determinations so far as they do bear on issues the shipper wishes to pursue. The Government recognizes this point when it says in its brief (p. 48) that many of the objections of the Atlantic City Electric appellants "to the kind of evidence the Commission relied on in its preliminary conclusions will evaporate when the Commission considers further detailed evidence in more specialized proceedings under Sections 13 and 15(1)."

Presumably such "further detailed evidence" would include detailed data concerning particular freight movements, the prospects for diversion of traffic and the other factors that are relevant to the lawfulness of particular rates.[30] It is likely that in the generality of proceedings involving particular rates the railroads by necessity would rely upon detailed evidence of this kind to justify the rates rather than upon any general determination made by the Commission in some earlier general revenue proceeding. Indeed, the Commission has held that when a rate is increased in reliance upon an order in a general revenue proceeding and is thereafter attacked, the railroad cannot justify the increased rate simply by reliance upon the Commission's prior

[30] The appellants in No. 78 (*Atlantic City Electric*) seek to buttress their diversion argument in this Court with assertions, wholly outside the record, that some coal traffic has been lost to the railroads since the rates here in question went into effect. If this is the kind of argument that is to be anticipated upon review of general revenue orders it is independently a reason for denying immediate judicial review and allowing the shippers to make their case on a record in a statutory proceeding directed to particular rates in which the Commission would have an opportunity to appraise the shipper's evidence.

general revenue determinations. *Globe Soap Co.* v. *Abilene & So. Ry.*, 40 I.C.C. 121, 123 (1916).[31]

In the event that the general revenue order proves irrelevant to the claims pertinent to the shipper's particular rates, or that its impact is superseded by more relevant evidence, the shipper is unaffected by the general revenue order determinations. Allowing him to challenge the general revenue order in advance of statutory proceedings concerning his particular rates is in such an instance not merely pointless but affirmatively harmful. The time of courts, lawyers and parties is expended resolving contentions that need never be pursued at all. This risk that resources will be needlessly wasted is, of course, one of the traditional reasons why exhaustion of remedies is required. *McKart* v. *United States*, 395 U.S. 185, 195.

It is possible on the other hand that in a complaint proceeding certain of the determinations made in a prior general revenue proceeding might become relevant. If this should occur there is no reasonable basis for contending that the Commission would or could regard the relevant issue as irrevocably resolved by its prior determinations. Res judicata principles have only a limited office in administrative proceedings, see 2 Davis, *Administrative Law* § 18.02 (1958), and—more specifically—reliance on Ex Parte 259 to preclude inquiry in future complaint cases would be inconsistent with the Commission's explicit concluding statement on this very subject: "The increased freight rates and charges authorized herein are not considered as pre-

[31] The Commission there said: "The permission given in *The Five Per Cent Case* . . . was necessarily general. That case did not approve any specific rate as reasonable in itself or as properly adjusted with respect to other rates, nor did it justify in advance any rate which might be published as a result thereof."

scribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370, and will, *in all respects*, be subject to complaint and investigation as provided by the act" (App. 393a) (emphasis added).

The Government and appellants suggest that a passage in *Koppers Co.* v. *Chesapeake & O. Ry.*, 303 I.C.C. 383, 387 (1958), establishes that issues determined in a general revenue proceeding cannot be questioned in a subsequent complaint case. The passage is too murky to support this broad interpretation. In context, it appears rather to be an unexceptionable statement by the Commission that the question whether the record in the general revenue proceeding justified the Commission's action in allowing the general rate increase to become effective was not relevant to the issue of the legality of the particular rates because that issue should be decided on the basis of the record made in the proceeding relating to those rates.[32] Furthermore, a reading of the entire passage cited by the Government and appellants shows that the principle they attribute to the Commission is so lacking in elementary logic that it is inconceivable that the Commission could ever have adopted it.[33] Certainly any attempt by the Commission to apply such a principle in future cases would undoubtedly be corrected by the courts.

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[32] This reading is supported by the fact that in *Koppers* and the related cases (Koppers Co. v. Chesapeake & O. Ry., 301 I.C.C. 284 (1957), and Consolidated Edison Co. v. Virginian Ry., 292 I.C.C. 23 (1954)), the Commission did not rely upon its determinations in the general revenue proceeding but decided the cases on the evidence presented in those cases.

[33] The very passage in the ICC's *Koppers* decision relied upon by the Government and appellants (see 303 I.C.C. at 387) is followed immediately by a statement of the Commission recognizing that the complaining shipper had not been allowed direct

If the railroads were to rely in a complaint case upon any findings in a general revenue order, a shipper would be able to assert that the findings or the proceedings leading to the findings were flawed in any of the ways the appellants allege. The question for the Commission would be whether there were any such errors and, if so, whether the errors infected the findings now relied upon. Even in such a situation, however, the alleged errors would be narrowed to those that had any bearing on general revenue determinations pertinent to the complaint case.

If in a statutory proceeding directed to particular rates the Commission relied in any degree upon its prior determinations in a general revenue proceeding and ruled against the shippers' claims of error in those determinations, the Commission's rejection of those claims would be subject to judicial review under traditional standards. The district court in No. 78 (*Atlantic City Electric*) so held and we submit that its holding was correct:

> "We see no reason why upon making a proper record before the commission in a Section 13 proceeding, plaintiffs cannot preserve the objections which they now assert to the procedure leading up to the general revenue order. We believe that an adverse ruling of the Commission on these objections should be reviewable by a court upon its

judicial review of the general revenue order because his proper remedy was the complaint proceeding then under way in *Koppers*. It would have been patently inconsistent for the Commission to have acknowledged that the shipper could not obtain direct review of the general revenue order because he had an adequate remedy by way of complaint and then to hold in the complaint proceeding that he was bound by the general revenue order's determinations because they were not reviewable.

review of the Commission's final order in the Section 13 proceeding" (App. 163a).

In the end the general revenue order and findings cannot bar a shipper from raising in litigation over any rate by which it is affected any issue relevant to the reasonableness of the rate. If the shipper prevailed and the rate were found unlawful, it would be cancelled and a lawful rate substituted for the future. Further, the shipper would have a basis for claiming reparations for the period in which it was made to pay the unlawful rate in the past. These statutory remedies fully protect the shipper's legitimate interest under the Act without any need for immediate judicial review of general revenue orders.

E. Appellants' Make-Weight Reliance on Those Parts of the Commission's Orders That Grant Relief under the Fourth Section and from Outstanding Rate Orders Is Not Entitled to Serious Consideration.

The appellants in No. 106, (*Alabama Power*) but not those in No. 78 (*Atlantic City Electric*) contend that the Commission's orders are reviewable because of the relief from Section 4 of the Interstate Commerce Act that they granted and the modification of outstanding rate orders that they effected. The contention, rejected years ago in *Algoma,* is without merit.

No appellant in No. 106 claims that he is prejudiced by the Section 4 relief and the outstanding rate order modification. Instead the appellants invoke the interests of a hypothetical shipper who obtains from the Commission an order prescribing a maximum railroad rate only to see the order set aside the next day as an incident to a general revenue order (br. 22-23). None of the *Alabama Power* appellants claims to be such a shipper. Likewise, no shipper in the proceeding before the Commission claimed to be in-

jured by reason of the Fourth Section long-and-short-haul relief granted by the Commission. Nor was any such claim made in either of the courts below by any of the appellants.

What the *Alabama Power* appellants seek is review of an entire general revenue order on the basis of incidental and minor parts which are not shown to have inflicted any injury on them. In answer to the same kind of argument the court in the *Algoma* case said that the rate order modifications and Fourth Section relief orders before it

> "are of themselves purely incidental to the main purpose of the proceeding before the Commission. Furthermore, it is to be noted that it is not clearly shown by the plaintiffs that they suffer any injury by virtue of these particular orders, which are merely a means to an end." 11 F. Supp. at 492-93.

Here the appellants have not even alleged injury as a result of these orders, much less shown it.

Moreover, even if appellants alleged and established injury to them because of the rate order modifications and Fourth Section relief, it would not follow that they would be entitled to the relief they seek in this case. At most, on the very rationale for review they urge, they would have a right to immediate judicial review only as to those few rates as to which prescriptive orders were outstanding or Fourth Section relief was necessary in order to allow increases. As to the vast majority of rates involved in this proceeding, which carriers are free to increase without advance Commission approval, the Commission's order would be no more subject to review than if it contained no reference whatever to Fourth Section relief or modification of prescribed rates.

II. IF THE COMMISSION'S ORDERS ARE HELD TO BE REVIEWABLE THEY SHOULD BE SUSTAINED ON THEIR MERITS

The railroads in their motion to affirm (p. 19) stated that if jurisdiction were noted and the Commission orders held reviewable, they would ask the Court to affirm in both appeals on the ground that there is no error in the Commission's orders. This request is made in the interests of conserving judicial resources by avoiding further litigation over the Ex Parte 259 that may occur in a number of district courts, and because of the extreme practical importance of resolving the validity of the general revenue orders here involved as promptly as possible (see pp. 33-35, *supra*).

The Government contends that the merits of the general revenue orders are not before this Court, asserting that the district courts did not pass upon the merits and that the appellants did not "present the issue for decision by this Court" (br. 18, n. 16). The fact that the courts below did not review the merits of the Commission's orders is not a bar to review by this Court, particularly where the issues on the merits "were thoroughly explored and contested before the Commission." *Chicago & N.W. Ry.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 326, 356. Nor is it relevant that the appellants did not raise the question on appeal; the appellees are entitled to defend the judgment below on any ground that will sustain it.[34]

[34] Since these appellees gave full notice of their intention to argue the merits, the failure of the appellants to brief the question is no bar to review. See United Gas Co. v. Callery Properties, Inc., 382 U.S. 223, 231 & n. 3 (separate opinion).

Shipper contentions directed to the merits of the Commission's orders were briefed in both of the lower courts. The district court brief of the shipper appellants in No. 78 (*Atlantic City Electric*) is at App. 88a-115a. Nine copies of the district court brief of the appellants in No. 106 (*Alabama Power*) will be lodged with the Clerk of the Court.

The mere size of the record before the Commission is not a valid reason for further delay; the contentions of appellants raise questions which do not require the detailed examination of the record but can be resolved on the face of the Commission's two reports. There is therefore no occasion to require initial consideration of the appellants' attacks on the merits of the orders by the district courts. While the Government also argues with respect to the merits that "the issues are complex" (br. 18, n. 16), we believe that brief examination will show the attacks on Ex Parte 259 advanced by appellants in the courts below can be speedily rejected.

Assuming the Commission's orders here involved are reviewable, there are certain general considerations applicable to that review which deserve comment before considering separately the various attacks that appellants make upon the validity of the orders.

As this Court observed in *Alabama G. S. R.R.* v. *United States*, 340 U.S. 216, 228, "The basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented." It is equally true that the nature and extent of the evidence required to support findings will depend upon the function and content of the findings and the context in which they are made. It is therefore proper in the instant case to consider the correctness of the Commission's orders in the light of the nature and function of the general revenue proceeding in which they were made.

As we have pointed out at pages 18-19 above, because a general revenue proceeding involves literally thousands of rates and commodities and a multiplicity

of parties and interests, and is usually conducted under severe time pressures, it would be impossible for the Commission in such a proceeding to determine that particular rates applicable to the shipment of particular commodities were just and reasonable, and this Court has held that such findings are not required. *United States* v. *Louisiana,* 290 U.S. 70, 76.

Accordingly, the Commission's determination is limited to a preliminary judgment that rate increases of a specified general magnitude should be permitted to become effective subject to the subsequent determination of the question whether the resulting rates are just and reasonable as they apply to particular movements of particular commodities. An order of the kind here involved does "not approve or fix" any particular rate or approve in advance any rate published as a result of the order, *Brimstone R.R.* v. *United States,* 276 U.S. 104, 123, and such questions are left open "in all respects" for further investigation and decision (App. 393a).

The nature and scope of appellate review in these circumstances should be consonant with the necessary limitations on the scope of the Commission's inquiry, the limited legal effect of the Commission's orders, and the opportunity shippers unquestionably possess to obtain Commission review of the particular rates affecting them. In these circumstances the requirement that the Commission's order be supported by adequate findings based upon substantial evidence is fully met if the Commission explains clearly its reasons for permitting the proposed rate increase to become effective and if the evidence indicates that the action was not arbitrary or capricious.

As we shall show below, the Commission fully and clearly explained its reasons for permitting the rate

increase to become effective and there was ample evidence in the record to provide a reasonable basis for this decision. It follows that under any standard of review that may properly be applied the Commission's orders should be sustained.

A. There Is No Merit in the Attacks on the Commission's Orders Made by Alabama Power Co., et al. (Appellants in No. 106).

The complaint of the *Alabama Power* appellants, in the Government's words, focused "upon the Commission's findings as to the railroads' costs and revenue needs and the reasonableness of the overall rate level . . ." (Gov. br. 10).

Those appellants asserted in the district court that the Commission misapplied statutory standards in determining that the increased revenue was necessary; that the Commission failed to make findings on the revenue needs of the railroads in the future; that it improperly treated the railroads' rate of return; and that the Commission improperly treated all railroads as a single group and did not consider the unit costs of handling individual items of traffic. See brief of Alabama Power Co., et al., D.D.C. No. 2970-68, pp. 13-39 (hereafter "D.D.C. br.").

The appellants' argument that the Commission misapplied statutory standards amounts on analysis to an assertion that the Commission's findings do not provide a rational basis for permitting the proposed rate increase to become effective. As we have shown above (pp. 6-7, *supra*), the Commission made particularized findings as to total expenses of the railroads during both a "base" year—1966—and a subsequent "constructive" year "which embraces all

known changes of record" since the base year (App. 263a). The Commission found that the increase in expenses during this period was approximately $855.4 million (App. 263a),[35]

Compared to this increase in expenses, the Commission found that the increase under consideration in Ex Parte 259 together with a prior increase since 1966 would generate only about $765 million in revenue. As it concluded, "approval of the entire rate adjustment would thus leave [the railroads] short by at least $89.2 million of annual revenue needed simply to cover their increased expenses" (App. 265a). The Commission also noted that the railroads had enjoyed an overall rate of return of 3.90 percent in 1966 and would obtain only 3.12 percent return in the constructive year even if the proposed increases were effective, returns which it described as "clearly inadequate" (App. 267a). The Commission also found that the increased rates "would have no material adverse effect on the movement of traffic" (App. 274a).

The appellants attack these findings as legally insufficient to support the Commission's conclusions. They direct their principal criticism to the Commission's choice of 1966 as the base year for purposes of comparison, describing its selection as "arbitrary"

[35] Recognizing that "cost totals alone are not meaningful except in relation to the volume of transportation performed" (App. 261a), the Commission analyzed unit operating costs by years. These figures confirmed that after remaining fairly level for several years through 1966, operating expenses per 1,000 gross-ton-miles rose from $5.58 in 1966 to $6.05 for the constructive year (App. 261a), an increase of 8.42 percent. The Commission in fact noted that this increase was "consistent" with the total dollar increase of $855.4 million which represented a growth of 8.58 percent between 1966 and the constructive year (App. 264a).

(D.D.C. br. 17). The Commission explained that the use of that year was reasonable and fair to shippers "because it reflects recent experience not complicated by a major rate revision and the traffic volume is close to the current level" (App. 263a). This choice was reasonable and precisely the kind of choice which is within the Commission's competence.

The Commission's exercise of judgment is not shown to be arbitrary or irrational by appellants' argument that the selection of 1966 was not permissible in the absence of a subsidiary finding that the level of rates earned in that year was the minimum necessary to support adequate transportation. While appellants describe the year 1966 as one of "unparalleled prosperity for the nation's railroads" (D.D.C. br. 17), the Commission found that the rate of return in that year was only 3.90 percent (App. 267a). Having explicitly found that such a return was "clearly inadequate" (App. 267a), the Commission did more than was necessary in stating the obvious. Moreover, the increase in Ex Parte 259 still left the railroads well *below* 1966 levels (App. 264a-265a).

Appellants also argued that the Commission's ultimate findings of revenue need are fatally defective because although the Commission made findings with respect to the railroads' expenses in one constructive year, it made no such findings for additional years in the future, and particularly made no findings with respect to the capital needs or dividend requirements of the railroads (D.D.C. br. 18-21).[36] The Commis-

[36] The appellants in a related contention asserted that the record did not provide evidentiary support for the findings it says the Commission "should have made" to establish revenue need (D.D.C. br. 18). Since these findings were not necessary the arguments

sion's findings with respect to the imbalance between increased expenses and revenue in one constructive year was a reasonable basis for its determination to permit the proposed rate increase to become effective. It was not required to make comparable estimates for an indefinite series of future years. Even the appellants do not suggest that the record before the Commission provided the slightest support for any conjecture that the relationship between the railroads' revenues and their increased expenses would change within any reasonable time to the railroads' advantage.[37]

It is also clear that precise findings as to future capital needs would have been redundant because there was no basis whatever for concluding that capital expenditures would be substantially reduced in the immediate future. The Commission had found in *Increased Freight Rates, 1967*, 329 I.C.C. 854, 872 (1968) (Ex Parte 256), that the railroads' "need for large capital expenditures . . . will not abate in the foreseeable future . . . ." In Ex Parte 259 the Commission's interim report and appellants' brief show, in fact, that there was evidence before the Commission with respect to the railroads' capital needs and the rate of return necessary to enable the railroads to meet those needs (App. 265a-266a; D.D.C. br. 22-27). The Commission

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that appellants addressed to this evidence are irrelevant. In any case these arguments are merely attacks on the Commission's appraisal of the weight of the evidence and on the inferences that it drew therefrom. The courts have consistently held that on judicial review they will not substitute their judgment for that of the Commission on such issues. See for example Illinois Central R.R. v. Norfolk & W. Ry., 385 U.S. 57.

[37] In fact there has been no such favorable change in the railroads' situation as is shown by subsequent general revenue proceedings (see p. 13, supra).

"therefore was entirely reasonable in determining that, having found that the increase was justified because of the imbalance between expenses and revenue, it was not required to pursue a line of inquiry or make findings that would not affect the outcome of the case."[38]

A further objection of the appellants to the Commission's revenue need determinations was directed to the Commission's discussion of the railroads' rates of return (D.D.C. br. 27-32). This objection is briefly answered by the Commission's explicit statement that its basic allowance of the rate increase was justified on "other grounds"—the increased expenses suffered since 1966 and the lesser amount of revenue to be produced by the rate increases. In any event, the Commission is not forbidden by any precedent or statute from giving appropriate weight to the rate of return which, as this Court has said, is "a familiar tool of analysis in the financial community." *Chicago & N. W. Ry.* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 326, 343-46.

The *Alabama Power* appellants also object to the Commission's orders because they granted the same rate increase nationwide (D.D.C. br. 32-35). It is

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[38] The appellants' citation in their district court brief (pp. 19-20) of D.C. Transit v. WMTA, 350 F.2d 753 (D.C. Cir. 1965) does not advance their argument. That case involved a definitive determination that particular rates were just and reasonable and has no bearing on the kind of findings that may be appropriate and sufficient in a general revenue proceeding where the Commission merely determines whether to permit a proposed general rate increase to become effective and reserves for later consideration the question whether any particular rates are just and reasonable. Furthermore, that case arose under a regulatory statute whose provisions differed in significant respects from the provisions of the Interstate Commerce Act.

undeniable, however, that the impact of cost increases was felt everywhere. Overall the increased rates still fell short of meeting the railroads' total need for revenues to offset rising costs. No regional group of carriers was put in a position by the increases to make an unreasonably large profit. Even though there are regional differences in the returns realized by the railroads, returns in all regions are below a reasonable level (App. 267a). The Commission's practice of treating railroads as groups, born of the necessities of large-scale rate-making and divisions cases, has long had the sanction of this Court. *Chicago & N.W. Ry.* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 326, 340-43; see *United States* v. *Louisiana*, 290 U.S. 70, 76-77. There is no indication in any of the cases on the subject that the group may not be nationwide,[39] and the nationwide approach is especially suitable where the Commission explicitly reserves to shippers full opportunity to bring maladjustments to its attention for correction (App. 276a).

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[39] Certain of the appellants argue that because of the amendment of Section 15a(2) of the Interstate Commerce Act in 1933, United States v. Louisiana, supra, and similar cases are no longer good law and that after the amendment it was improper for the Commission in a general revenue proceeding to make determinations with respect to the railroads as a group (D. D.C. br. 34). That amendment was part of a revision that removed from the Act the "re-capture provisions" first enacted by the Transportation Act of 1920. It was not intended to prevent the Commission from making determinations with respect to groups of railroads in any situation where such determinations were appropriate, as the decision in Chicago & N.W.Ry. v. Atchison, T. & S.F. Ry., 387 U.S. 326, shows. Since 1933, the Commission in general revenue proceedings has consistently followed the practice of making determinations applicable to large groups of railroads. If it could not do so it would be severely crippled in discharging its regulatory responsibilities.

The Alabama Power appellants' final argument below related to unit costs (D.D.C. br. 36-39). Its contention on this point is very similar to the contention made by the appellants in No. 78 (*Atlantic City Electric*) that we shall next consider.

B. There Is No Merit in the Complaints Against the Commission's Orders Made by the Appellants in No. 78 (Atlantic City Electric Co., et al.)

The appellants in No. 78 (*Atlantic City Electric*) argue that the Commission's orders are invalid because the Commission did not "affirmatively" develop an adequate record; because the Commission erred by failing to make findings on the unit costs of transporting particular commodities; and because of alleged deficiencies in certain of the Commission's determinations relating to particular commodities, such as coal and grain (App. 92a-108a; see 40a-42a).

The argument that the Commission did not "affirmatively" develop an adequate record is essentially a procedural argument. It rests on the assertion that the Commission was required to direct its Bureau of Accounts or a member of its legal staff to participate in the proceeding (App. 95a-98a). This argument is directed to the Commission's internal administration and its allocation of staff responsibilities. The Commission, like other administrative agencies, "must have wide scope in its administration of the business committed to its charge" and the problem of administering that business "is singularly within" its prerogative. *United Airlines* v. *CAB*, 228 F.2d 13, 16 (D.C. Cir. 1954). Whether participation of the Commission's staff in the proceeding was appropriate is one of "the subordinate questions of procedure" which is left to

the Commission's discretion. *Cf. Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 138. Appellants' arguments provide no rational basis for the conclusion that the Commission's orders are invalid because of the way in which the Commission exercised its discretion in this case.

The authorities cited by appellants do not suggest that the Commission is required to direct that members of its staff participate in a general revenue proceeding; those authorities cited are general admonitions about the agency's responsibility to develop an adequate record (see App. 95a-103a). These admonitions are not pertinent here. Participation by the agency staff may be important when the alternative consists solely of reliance on railroad evidence, see *Baltimore & O. R.R.* v. *United States*, 386 U.S. 372, 436 (concurring opinion). But in the instant case, there was vigorous participation by numerous shippers and powerful shipper associations who opposed the railroads' proposals and subjected those proposals to detailed criticisms.[40]

Appellants' assertion that because of the lack of staff participation in the proceeding the Commission failed to develop an adequate record is not supported by any specific showing of prejudice to themselves. It is cast in general assertions which simply reflect the

[40] There is no basis for the claim made by certain of appellants (see App. 7a) that the ICC erred when it omitted to provide for a recommended report by the examiner "without stating on the record that this procedure was eliminated because of the necessity of the due and timely execution of its functions . . . ." Before entering into any hearings, the Commission explicitly ordered that the proceeding "will not be the subject of an examiner's recommended report and order because due and timely execution of our functions requires an expedited decision" (App. 247).

appellants' dissatisfaction with the Commission's exercise of its informed judgment. As the Commission's reports and the discussion in this brief show the Commission developed a fully adequate record and found in that record a reasonable basis for permitting the proposed rate increase to go into effect.

The central substantive contention of appellants appears to be that the Commission was required to make findings related to the cost of particular commodities or movements of commodities (see App. 104a-108a). The Commission did examine unit costs of traffic movement generally, finding that they had risen about 8.42 percent between 1966 and the constructive year (App. 261a). However, the appellants insist that cost figures for the movement of individual commodities—for example on bituminous steam coal—should have been developed (App. 106a). The Commission held that "costs of specific commodity movements are not in issue", explained its reasons for this determination, and cited earlier general revenue proceedings in which this principle was applied (App. 205a).

The dispute on this point plainly does not require an examination of the record as a whole or particular evidence, nor is it one that will be illuminated by analysis in a district court. The dispute turns simply on a question of law, that is, whether in a general revenue proceeding, where the Commission is not determining that particular rates are just and reasonable, it is required to determine unit costs for the movement of each of the many particular commodities or groups of commodities involved. There is no provision of the Act or judicial decision that imposes this burden upon the Commission. As the Commission here pointed out, to impose any such requirement would require it to engage in the "compilation, presentation,

and evaluation of data of such massive proportions" as to "make impossible the effective prosecution" of its regulatory functions (App. 286a).

Appellants' insistence that cost-findings on individual commodities or groups of commodities are essential rests upon a fundamental misconception of the function and effects of the Commission's order. They assume that in this proceeding the Commission was either required to determine that particular rates were just and reasonable or that in fact it did so (see, for example, App. 106a). The first assumption is invalid as a matter of law, *United States* v. *Louisiana*, 290 U.S. 70, 76;[41] the second is incorrect in point of fact because the Commission plainly stated that it was making no such determinations (App. 275a-276a).[42]

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[41] The assertion that United States v. Louisiana is no longer authoritative because of the 1933 amendment to the Interstate Commerce Act (App. 108a) has been discussed at p. 58, n. 39, supra.

[42] The argument that unit costs must be considered for particular commodities is the essence of the argument made by the Secretary of Agriculture in the district court. The Secretary to an even greater degree than the shipper appellants (see App. 197a) asserted that, whether or not required by general principles, examination of individual unit costs in this proceeding was required by a paragraph in Increased Freight Rates, 1967, 332 I.C.C. 280, 285-86 (Ex Parte 256). The argument is based upon a misreading of the Commission's statement in that case which was directed to establishing unit costs as a check on the relevance of total dollar costs. Id. at 286. Nothing in the Commission's discussion there suggested that the Commission contemplated considering unit costs for individual commodities or even groups of commodities in general revenue proceedings. The Commission itself explicitly rejected appellants' extrapolation of that discussion: "Our admonition in Increased Freight Rates, 1967, 332 I.C.C. 280, 285, respecting a study of the unit costs of performing transportation services did not contemplate detailed, individual studies of particular traffic movements" (App. 285a-286a).

Appellants also claimed that there was "no evidence at all" to rebut their evidence that the proposed rate increase would cause a substantial loss of coal traffic by stimulating the use of other forms of energy or other modes of transportation (App. 93a). This assertion is demonstrably incorrect on the face of the Commission's final report which summarizes the evidence that the railroads presented on this issue. There was substantial support in this evidence for the Commission's rejection of appellants' argument (App. 309a-310a).

As a part of the same argument, appellants asserted that the Commission delegated its functions to private parties (App. 93a). They rest this assertion merely on the ground that the Commission pointed out in its discussion of coal traffic that "should competitive situations arise, appropriate adjustments can be made by producers and carriers" (App. 310a). This statement is nothing more than a wholly proper observation by the Commission that if any danger of substantial diversion of traffic should arise it was reasonable to expect that the railroads would make competitive adjustments in coal rates. Here again, the Commission's own report shows that there was substantial evidence to support the Commission's view (App. 303a).

In the district court, the State of New York and the agencies of several other states also complained of the Commission's orders (see App. 36a). They did not advance the more general contentions already discussed; rather, as the Government states (br. 12), their attacks were "directed with considerably more specificity than the coal users' complaint, to the authorization of a six percent increase in rates on grain

and feed moving into the Northeast." The nature of the arguments is generally illustrated by the claim that the increases "were unduly prejudicial of the Northeast and unduly preferential of the Southeast" (App. 41a), and by the claim that the Commission refused to consider "a comprehensive cost study for the traffic involved. . . ." (App. 40a).

The Commission made it clear that a general revenue proceeding is not the appropriate place for resolving such contentions. It said, for instance, that "rate differences between various origin areas cannot be appropriately considered or adjusted in a general increase proceeding" (App. 334a) and that the "compilation, presentation and evaluation" of cost data relating to specific commodity movements "would make impossible the effective prosecution of our regulatory function . . ." (App. 286a). If the somewhat less specific findings urged by other appellants and discussed above can be deferred pending statutory complaint proceedings under Sections 13 and 15, as even the Government concedes is proper (br. 45), then certainly claims of this kind need not be pursued by the Commission before allowing a general rate increase to become effective.

CONCLUSION

The judgments of the district courts should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 106

ALABAMA POWER COMPANY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

The argument portion of the brief of the Appellees, Aberdeen and Rockfish Railroad Company, et al. (Railroads), is divided into two parts: Point I discusses the jurisdictional question; Point II discusses the validity of the Commission's orders, although the merits of the case were not considered by the Court below and have not been argued by Appellants or by the Government. This brief replies to both parts of the Rairoads' brief.

I.

REPLY TO POINT I. — THE JURISDICTIONAL ARGUMENT

General Comments

The Railroads' brief makes no effort to come to grips with the arguments in plaintiffs' brief which we think demonstrate that Commission orders in general increase cases are reviewable. It ignores the statutory provisions authorizing judicial review, the principle that judicial review will not be cut off unless there is persuasive reason to believe that Congress so intended, and the facts that plaintiffs seek review only of the increase in the general level of rates and not of the relationship of any particular rates to such general level, and that plaintiffs' action is a class action. It seeks to create the impression that the Commission's orders of which review is sought are "preliminary" (RR brief, p. 15), a "tentative administrative judgment" (p. 22) and "no more than a first step," (p. 20) but never discusses the principles which determine when agency action becomes "final." As pointed out in our original brief, the Commission's "Final Report and Order" (281a) finally disposes of the question of revenue needs, authorizes increased rates to be put into effect, finds that the rates authorized will not exceed a just and reasonable level and discontinues the proceeding. This is a final order by any test.

The Divisions Cases

As support for their contention that plaintiffs have failed to exhaust their administrative remedy,[1] the Rail-

[1] The argument that plaintiffs have an adequate administrative remedy is based on the Commission's statement that "Our findings as to justness and reasonableness . . . will not preclude interested parties from bringing any maladjustments to our attention

roads discuss the nature of a general increase case, quoting from *New England Divisions*, 66 I.C.C. 196, 203 (1922) and the *New England Divisions Case*, 261 U.S. 184, 198. The reliance on these cases illustrates the fallacy of their position. We agree with the Railroads that a general increase case and a general divisions case are substantially identical, as has been recognized both by the Commission and by this Court. Thus, in *New England Divisions*, the Commission, immediately following the language quoted at page 19 of the Railroads' brief,[2] went on to say:

> Is there good reason why a similar policy should not be pursued when parts of rates, i.e., divisions, are in issue? Manifestly there is need, in the case now before us, for a thorough revision of divisional arrangements upon a more logical and systematic basis. Manifestly, also, if a horizontal increase is made before this revision takes place, the result may be to leave certain divisions too high and

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for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act." (393a) A shipper always has the right to challenge the lawfulness of any rate, whether or not prescribed by the Commission. The statement that the increased rates "are not considered as prescribed", if effective, can do no more than preserve to shippers the right to claim reparations on past shipments. It does not affect reviewability. See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 in which the Court reviewed a Commission order finding rates 'not unlawful" which the Court held "leaves them open to possible recovery of reparations." (p. 687)

[2] "in all . . . general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the Commission reduced to a state of administrative paralysis." (p. 19)

> others too low. But in this respect the results flowing from the general increases or reductions in rates which we have frequently authorized have been parallel.
>
> * * *
>
> It has been suggested that when we authorize a horizontal increase in rates any shipper who may thereby be subjected, in a particular case, to the payment of unreasonable charges has the opportunity to obtain an award of reparation. But such an award can not be obtained, as a rule, without expense; and, furthermore, if similar general relief were granted in a divisions case, *the opportunity would likewise be open to any individual defendant carrier to complain at once of its own divisions, and upon proper showing to obtain a revision dating back to the filing of its complaint.*[3]
>
> * * *
>
> Upon further consideration we are of the opinion that in a case involving divisions we may, when the public interest so requires, grant immediate relief subject to later readjustments, as we have done in cases involving general increases or reductions in rates. Otherwise, we shall fail to do substantial justice. The act requires a practical administration, and prompt action where that is necessary in the public interest. (pp. 203-204)

Likewise, in the *New England Divisions Case,* this Court, immediately following the language quoted by the Railroads at page 19 of their brief,[4] said, "The necessity of adopting a similar course when multitudes

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[3] Emphasis supplied in this brief unless otherwise noted.

[4] "[I]t was the actual necessities of procedure and administration which had led to the adoption of that method [of proceeding on 'evidence deemed typical of the whole rate structure'] in passing upon the reasonableness of proposed rate increases." (p. 19)

of divisions were to be passed upon was obvious. The method was equally appropriate in such inquiries."

Although a general increase case and a general divisions case are indistinguishable in principle, this Court had no question about the right of the plaintiff Railroads in the *New England Divisions Case* to obtain judicial review of the general order without first "exhausting their administrative remedy" by filing a complaint with the Commission seeking a determination as to the lawfulness of the divisions in which they were interested. The courts have continued to entertain actions by railroads seeking review of similar orders in divisions cases. *Baltimore & Ohio R. Co.* v. *Aberdeen & R.R. Co.*, 393 U.S. 87. The Railroads offer no explanation why a different rule should apply to shippers.

Adequacy of Administrative Remedy

The argument that plaintiffs have a fully adequate administrative remedy by filing a Sec. 13 proceeding is answered by the Commission's admission that "apparently" no such remedy is available. (Govt. brief, p. 33) That such a remedy is *not* available is also readily demonstrable.

In an individual rate case the issue is not the revenue needs of the carriers but whether the individual rate is bearing more than its reasonable share of the transportation burden. The question of reasonableness in such a case is resolved by determining whether the rate is properly related to the general level, considering such factors as the cost of handling the movement involved, the ability of the movement to bear the rate and the relationship of the rate to other rates. These are not the issues raised by plaintiffs. They challenge

the increase in the over-all level of rates and not the realtionship of individual rates to other rates or to the over-all level of rates.

What would happen in a subsequent complaint proceeding can be shown by a simple example. Let us assume that prior to the general increase the general level of rates was 100, that individual rates ranged from 70 to 130 and that the increase was a flat 5 percent. After such an increase the general level would become 105 and individual rates would range from 73.5 to 136.5. If a rate was 130 prior to the increase, and 136.5 subsequent to the increase and if the 130 figure was reasonable in relation to the then level of rates, the 136.5 rate must be reasonable with reference to the post-increase level.

The Railroads argue that in a subsequent complaint proceeding the general revenue order "may have no impact at all upon the arguments a shipper may wish to make to show that rates on his shipments are not lawful" (RR brief, p. 43), and that the general revenue order may prove to be irrelevant.

Where a shipper is challenging only the increase in the over-all level of rates, the *only* issue in a subsequent complaint proceeding before the Commission would be whether the general increase should have been granted. Orderly administration would preclude relitigation of this issue in numerous complaint cases and, accordingly, these plaintiffs are left with no administrative remedy whatsoever.

The Railroads would equate the orders of which review is sought in this case with a discretionary order not to suspend a rate. (RR brief, pp. 21-22) The two have nothing in common. A decision not to suspend is

truly tentative. It is simply a determination that a proposed rate does not so clearly appear to be unlawful that it should be suspended without a hearing. Such a determination requires neither a hearing nor findings. Here the tentative determination was made when the Commission decided to suspend the proposed increase only in part and to investigate. The final order of which review is sought was entered at the close of the investigation thus ordered on the basis of detailed findings, including a finding that "The increased freight rates and charges authorized herein will not exceed a maximum reasonable level, . . .". (393a) This is *the* final determination of what constitutes a maximum reasonable level of rates as of the date of the order. That issue will never again be considered by the Commission unless the order is set aside by the courts.

Algoma and Related Precedents

The Railroads argue that the unreviewability of general increase orders is such a well settled and long-standing doctrine that it should be overturned only by the Congress.

The "foundation case" on which the Railroads rely (RR brief, p. 24) is *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va. 1935). While the opinion in *Algoma* is less than a model of clarity, four separate arguments are discernible therein:

1. That the order was permissive;

2. That the Commission had merely exercised its discretion not to suspend;

3. That the plaintiffs, who were attacking the increase specific rates only, had available on adequate administrative remedy; and,

4. That to grant relief on specific rates and permit the increase to remain on other rates would create confusion and discrimination as between plaintiffs and other shippers.[5]

None of the foregoing reasons are applicable here.

1. The permissive order doctrine is no longer valid, as the Railroads now recognize.

2. In the instant case the Commission suspended the rates in part and entered its final order after a full hearing.

3. Plaintiffs have no administrative remedy since they question only whether the authorization of the general increase was valid.

4. Since plaintiffs are attacking the increase as to all rates, the possibility of confusion and discrimination does not arise.

The "uniform" course of action following *Algoma* (excluding the cases now on appeal) consists of one District Court case involving rates on a specific commodity, *Koppers Co.* v. *United States,* 132 F. Supp. 159 (W.D. Pa. 1955) and one case involving an order applicable to refrigeration charges, *Florida Citrus Commission* v. *United States,* 144 F. Supp. 517 (N.D. Fla. 1956), aff'd *per curiam* 352 U.S. 1021, in which, after determining the issue of jurisdiction, the Court went on to decide the case on the merits. *Per curiam* affirmance does not, therefore, indicate approval by this Court of the legal conclusions of the Court below. Add the decision in *Birmingham Slag Co.* v. *United States,* 11 F. Supp. 486 (N.D. Ala. 1935), which pre-

[5] The Court also reviewed the Commission's order and sustained it on the merits.

ceded *Algoma,* and we have four District Court cases denying judicial review of general increase cases under circumstances totally different from those here presented. This is scarcely an adequate basis for denying plaintiffs their clear statutory right to judicial review in this case.

The present case is a case of first impression. It is the first case in which shippers have sought Court review of an order in a general increase case insofar as it authorizes an increase in the general level of rates. This is not surprising. In general increase cases, shippers are disorganized: each one is interested in his own commodities. In the present case, a consortium of shipper organizations was formed which contested the general basis for the Railroads' case. So far as we know, this is the first occasion on which the Railroads' general case has been met head on by shipper groups.

Outstanding Orders and Fourth Section Relief

The Railroads dismiss as a "make weight" plaintiffs' reliance on the portions of the order which granted relief from outstanding orders and Fourth Section Relief. They characterize these portions of the order as simply "an incident to a general revenue order . . .". (RR brief, p. 48) This is not a proper characterization. The importance of these provisions was recognized by Judge Wright in his dissent.

> There can be no doubt that there are plaintiffs who are aggrieved now by this order. The effect of the order was to remove the upper limits on rates which the Commission had prescribed for certain commodities. Without this order, the railroads could not have increased any of the Commission-made rates. (217a)

The Railroads would give the impression that the only reason for seeking authority from the Commission prior to publication is the mechanical problem involved in publishing increases on many rates. (RR brief, p. 4) This is undoubtedly one reason but their petition demonstrates that the need for modification of outstanding orders and for Fourth Section Relief is of at least equal importance. (228a, 233-4a)

The Railroads concede that the order is reviewable as to rates to which the modification of outstanding orders and Fourth Section Relief are applicable (RR brief, p. 49) but suggest that this does not make the order as a whole reviewable. This assumes that the Commission would permit the railroads to increase all rates except those governed by outstanding orders or those in which the increase would create a Fourth Section departure, leaving such rates not subject to the increase. It cannot be assumed that the Commission would permit the railroads to act in such an arbitrary fashion. Modification of outstanding orders and Fourth Section Relief are essential parts of the Commission's orders. It follows that they afford additional grounds for judicial review.

The railroads argue that plaintiffs have not shown that they are affected by the modification of any outstanding orders or by the Fourth Section order. They overlook the fact that this is a class action which covers all rates of all shippers. If there are outstanding rate orders or if Fourth Section departures are created by the increases, both of which the railroads concede, the plaintiffs are directly affected.

Public Policy Considerations

The final argument advanced by the railroads is that the Court should deny plaintiffs the relief to which they are entitled because a ruling that general increase orders are reviewable would create a possibility that the railroads, in future cases, would suffer a monetary loss through the improvident granting of interlocutory relief. A similar argument was rejected by this Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136. It was pointed out that "The short answer to this contention is that the courts are well equipped to deal with such eventualities." (pp. 154-155) There is always some possibility, we suppose, that courts will act irrationally or will abuse the jurisdiction vested in them. This risk is inherent in the judicial process; it is scarcely a reason to deny to aggrieved parties the judicial review which Congress has afforded them.

The Railroads suggest that shippers be left to seek relief in Congress. But Congress has already conferred the right of judicial review on shippers with full knowledge that interlocutory relief may be granted in cases in which the courts deem such relief to be appropriate. If the Railroads are dissatisfied with what Congress has done, it is they who must seek legislative relief. If Congress agrees with the Railroads that the possibility of interlocutory relief subjects them to unreasonable risks, it can prohibit such relief in general increase cases or condition it upon the imposition of adequate refund provisions.

It should not be overlooked, moreover, that, in asking the Court to look at policy considerations, the Railroads are asking it to examine a coin with two sides. We submit that the policy considerations which dictate that general increase orders be subject to judicial review vastly outweigh those on the other side.

A general increase order may increase the freight bill of the nation by half a billion dollars, as in this case, or by much greater amounts, such as the billion and a half increase which will result if the increases sought in *Ex parte No. 267, Increased Freight Rates, 1971* are granted. Increases of this magnitude have a serious impact on the economy of the nation. They can contribute substantially to inflation and they directly affect the economic well-being of every person.

The Commission is charged with responsibility for protecting the public interest and it is important that it carry out that responsibility in accordance with the requirements of the statutes under which it operates. The responsibility is particularly grave in the case of a general increase because in such a case the public is at a serious disadvantage. The Railroads have all the facts at their command and ample time to prepare their case. The facts available to the shipping public are limited. Shippers have knowledge of their own operations but only such information about the Railroads as the Railroads choose to make available or as may be available in published statistics.

Unlike the courts and most agencies, the Commission discourages discovery. In fact, discovery is virtually unobtainable in Commission proceedings. Moreover, the Commission, unlike other regulatory agencies such as the Federal Power Commission, does not provide for participation by its staff in general increase proceedings.[6] Under these circumstances, it is of the utmost

[6] "The ICC's habit of determining vital transportation policies almost exclusively on the basis of materials supplied by private groups inevitably tends to warp the policies in favor of those who are most strongly represented and against what is often the inadequately represented public interest." Davis, Administrative Law Treatise § 15.05.

importance that the Railroads be required to make their case and that the Commission make the findings which are necessary to enable the courts to determine whether the statutory standards have, in fact, been applied. How well the Commission carried out its obligation to apply the statutory standards is, we think, apparent on the face of the Reports involved in this case.[7] These Reports are discussed, *infra*, pp. 13-19 under Point II.

The availability of court review has a healthy effect both on the carriers seeking the increase and on the agency which must pass on the increase. It should occasion no surprise if, as we contend, the absence in the past of judicial review of general increase cases, in which the Railroads have always received from the Commission most of what they have asked, has lulled them into the assumption that they need present only a superficial case and has resulted in something less than a critical analysis by the Commission of the testimony presented. Public policy considerations, we submit, imperatively demand that the reviewability of general increase orders be definitively established at this time.

II.

REPLY TO POINT II. — THE MERITS OF THE COMMISSION'S ORDERS

The complaint challenges the Commission's orders on three basic grounds; failure to apply the statutory standards, failure to make the necessary findings, and

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[7] Compare, for example, the unexplained determination of the Commission that increases should be uniform nationwide with the finding that "average territorial costs fairly represent the costs of North-South traffic" which this Court declined to take on faith in *Baltimore & Ohio R. Co.* v. *Aberdeen & R.R. Co.*, 393 U.S. 87, 91.

lack of substantial evidence in the record. We assume that this Court will not wish to pass on most of the questions raised without the benefit of their consideration by the lower court. *Cf. Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 156. The substantiality of evidence, in particular, is a question as to which orderly judicial procedure would seem to call for initial review by the lower court, especially with a record as voluminous as the one in this case. There are, however, two errors on the face of the Report which the Court may view as calling for reversal on the merits at this time.

The Uniform Nationwide Increase

The first of these errors is the action of the Commission in ordering a uniform nationwide increase without explanation as to the basis for doing so. As pointed out in our brief to the Trial Court (p. 33), the southern roads, without the increase, would be better off financially in the "constructive year" [8] than would the eastern roads with the increase. This at least suggests that a uniform nationwide increase may not be the answer. In previous general increase cases the Commission has frequently allowed varying increases to the railroads in the different sections of the country.[9] In *Ex Parte No. 267, Increased Freight Rates, 1971*, the Railroads,

[8] The "constructive year" assumes the estimated 1968 level of traffic and also assumes increased costs incurred or anticipated in the last half of 1968 to have been in effect for the entire year. (261a)

[9] *Ex Parte No. 166, Increased Freight Rates, 1947*, 270 I.C.C. 403 (1948); *Ex Parte No. 175, Increased Freight Rates, 1951*, 280 I.C.C. 179 (1951); *Ex Parte No. 206, Increased Freight Rates, E., W., & S. Territories, 1956*, 300 I.C.C. 633 (1957). *Cf. North Carolina* v. *United States*, 325 U.S. 507, 515 (fn. 4).

themselves, are asking a 15 percent increase in the East and West and a 6 percent increase in the South.

It is conceivable that there are factors which would make a uniform nationwide increase appropriate, in spite of the wide differences in financial need of the different territorial groups of railroads, but surely the Commission had a responsibility to explain why it arrived at a result which seems, on its face, to be unjustified. The Railroads argue for the validity of this action by citing cases supporting the treatment of railroads as groups. We do not argue that they should not be treated as groups. We do insist that once the grouping has been established, as has been done in this case (Eastern, Western and Southern Districts), the Commission needs to look at the circumstances of each of the groups and to explain the reasons for either identity or difference in treatment.

Failure To Apply the Statutory Standards

A second error on the face of the Reports is the failure to apply the standards set out in Section 15a(2) of the Interstate Commerce Act, the so-called "Rule of Rate Making." Section 15a(2) requires the Commission to give due consideration

> to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (49 U.S.C. § 15a(2))

Nothing in the Reports suggests that consideration was given "to the need, in the public interest, of adequate

and efficient railway transportation service *at the lowest cost consistent with the furnishing of such service.*"

The sole basis given by the Commission for its approval of the rate increase is its finding that increases in operating expenses, rents, taxes, fixed charges and contingent interest between the year 1966 and the "constructive year" exceeded the sum of the increases authorized in the preceding general increase case and the increases sought in *Ex Parte No. 259*. The only justification advanced for use of 1966 is as follows:

> Use of 1966 as a base year is reasonable, and fair to shippers, because it reflects recent experience not complicated by a major rate revision, and the traffic volume is close to the current level. (263a)

Were rates in 1966 at the "lowest level consistent with the furnishing of adequate and efficient railway transportation service"? There is nothing in the Report to suggest that they were and some indication that they were not. The year 1966 was the Railroads' most prosperous year in recent history. The Railroads refer to the finding by the Commission that operating expenses per thousand gross ton miles had increased from $5.58 in 1966 to $5.96 in 1968 and to $6.05 for the constructive year,[10] an increase of 8.42 percent. But operating expenses per thousand gross ton miles for the constructive year were only 1.68 percent above the 1961 level and in 1968 they were almost identical to those incurred in 1961, $5.96 versus $5.95.

Another fact throwing doubt on the propriety of using 1966 as a base year is the level of capital ex-

[10] The actual finding was that such expenses increased to "an *estimated* $5.96 in 1968, and $6.05 for the constructive year." (261a)

penditures in that year. In 1966 capital expenditures were the highest in history, $1,953 million. The Railroads quote the Commission's finding in *Ex Parte No. 256, Increased Freight Rates, 1967,* 332 I.C.C. 280 (1968) that the Railroads' "need for large capital expenditures . . . will not abate in the foreseeable future." (RR brief, p. 56). They neglect to quote the following sentence, "The petitioners estimate that 25 rail carriers intend to spend over $1,233 million for gross capital expenditures in 1967." These 25 carriers represented 87 percent of the railway industry[11] which indicates a prospective capital investment in 1967 of $1,417 million, over a half billion less than was spent in 1966.

The criticism of the use of 1966 as a base year should not be construed as an endorsement by plaintiffs of the technique of building on a "base year." Section 15-a(2) requires the Commission to determine the revenue needs of the railroads. To make a finding as to the railroads' revenue needs, the Commission needed to determine the amount of capital expenditures which would be required, the method of financing such expenditures, and the revenues required to permit such financing.[12] It also needed to make findings as to the amounts needed for other purposes, such as dividends. This it wholly failed to do.

The plaintiffs' brief in the Court below places major reliance on this issue on *D.C. Transit System* v. *Wash-*

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[11] The 25 "test roads" in *Ex Parte No. 259* represented 89 percent of the railroad industry (VS 1, Ex. A., p. 35), slightly higher than the 87 percent shown in *Ex Parte No. 256.*

[12] The consortium of shipper groups specifically asked for findings on these issues. (D.D.C. br., p. 21) No ruling was made on any of the requested findings, despite the requirements of 5 U.S.C. § 557(c) that "The record shall show the ruling on each finding, conclusion, or exception presented."

ington Metro. Area Trans. Com'n, 350 F. 2d 753 (D.C. Cir. 1965). In that case the Court of Appeals, sitting *en banc*, set aside an order of the Transit Commission under a statute containing a rule of rate-making almost identical to Section 15a(2) of the Interstate Commerce Act on the ground that the Transit Commission had failed to make findings as to the amounts necessary for debt service, dividends and capital improvements. This well-reasoned decision is squarely in point.

The Railroads seek to distinguish *D.C. Transit* on two grounds. (RR brief, fn. p. 57)

(1) "That case involved a definitive determination that particular rates were just and reasonable and has no bearing on the kind of findings that may be appropriate and sufficient in a general revenue proceeding . . .".

D.C. Transit arose out of an effort by the carrier to raise the price of tokens to compensate it for increased operating expenses. The determinative issue was whether the Commission had properly applied the statutory rule of rate-making in determining the revenue needs of the carrier. This case presents that identical issue.

(2) ". . . that case arose under a regulatory statute whose provisions differed in significant respects from the provisions of the Interstate Commerce Act.".

The Rule of Rate-Making contained in the statute there involved was as follows:

> [*T*]*he Commission shall give due consideration, among other factors* to the inherent advantages of transportation by such carriers; *to the effect of rates* upon *the movement of traffic by the carrier or*

carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers *at the lowest cost consistent with the furnishing of such service; and to the need of revenue[s] sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.* (350 F. 2d 753, footnote 33)

The language common to that statute and to Section 15a(2) of the Interstate Commerce Act is in italics.

CONCLUSION

The judgment of the District Court should be reversed and the cause remanded for further proceedings.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

REPLY BRIEF

Statement of Position

It is the position of Appellants, Atlantic City Electric Company, et al., that the entire final order of the Interstate Commerce Commission ("Commission" or "ICC"), the underlying record it relied on, and the procedures it followed in its general revenue proceeding, "Increased Freight Rates, 1967, Ex Parte 259," are judicially reviewable. The Department of Justice argues on behalf of the United States, the Commission and the Secretary of Agriculture (collectively, the "Government"), that only part of such order is now reviewable. The Aberdeen & Rockfish Railroad Company et al. (the "railroads"), argue that no part of the order is now reviewable.

The respective complaints of all the Appellants, Atlantic City Electric Company, et al. ("Utility Appellants"), and the State of New York and the Departments of Agriculture

of ten eastern states ("State Appellants"), were so drawn as to attack in all of its aspects* the Commission's final order in the general revenue proceeding. The piecemeal review of the order, which the Government argues for, can result only in chaos and protracted uncertainty for Federal district courts, the Commission, the nation's shippers, and the railroads. Furthermore, the basic issues decided in a general revenue proceeding cannot, under any existing statute, properly be retried or reviewed in any further Commission proceeding. The issues raised by Appellants' complaints with respect to the Commission's procedures, findings, conclusions, and final order in its general revenue proceeding are not, as contended by the Government and the railroads, cognizable in complaint proceedings under §13 and §15(1) of the Interstate Commerce Act. These issues, having been finally decided by the Commission's order, are ripe for review by the three-judge statutory court provided for by Congress in the Urgent Deficiencies Act at 28 U.S.C. §1336.

Neither of the opinions below discussed the merits of the cases in any degree, but decided merely that the decision of the Commission was not reviewable at this time. The railroads have argued the merits of the Commission's decision, to which these Appellants do not reply, since they believe that there must be a trial on the merits below. The decision below should be reversed and the case remanded for trial.

Argument

The briefs submitted by the Government and the railroads outline the evolution of general revenue proceedings at the

* Although all the Federal parties agree that the Southern District Court's opinion in this case was wrong, the ICC argues that the *Atlantic City* case should not be remanded, because it asserts that Appellants' complaints did not attack the Commission's findings as to general revenue needs and costs of the railroads. This position is based on the ICC's opinion that only those portions of its order relating to revenue needs and overall costs of the railroads are reviewable.

Commission and the history of the particular proceeding under appeal. Both stress the value and importance of general revenue proceedings to railroad ratemaking and regulation. The Utility Appellants and State Appellants agree that this kind of proceeding is an important tool in railroad ratemaking. However, it follows from this that far more weight and finality must be accorded to the determinations made by the Commission in such general revenue proceedings than either the Government or the railroads here have conceded.

All Appellants herein assert not only that the ICC made a final determination as to the railroads' costs and revenue needs, as conceded by the Government, but that it also made a final determination as to how the additional revenue should be raised, that is, how much of it should be derived on a commodity-by-commodity basis from the various percentage increases authorized. For example, the ICC found that all coal freight rates could be raised 5%.* It also found that coal traffic would not be diverted by such an increase. All such findings are appropriate and necessary to a general revenue proceeding, wherein proposed rates are under investigation, and should be accorded finality and immunity from collateral attack. As a necessary concomitant of such finality, of course, Utility and State Appellants assert that there must also be judicial review of all such determinations in accordance with the established standards of judicial review set forth in the Administrative Procedure Act and upheld by decisions of this court. (See, for ex-

* The Government and the railroads argue that the ICC's findings on allocation of the general rate increase among commodities were preliminary in nature only, but in fact, such findings were detailed and final. For instance, the Commission considered, among other things, whether the rates on shelled walnuts should be increased by 6%, as the railroads requested, or whether such rates should be increased only as much as the increases proposed on nuts in shell, that is, 5%. After discussion of the problem, the Commission decided that both shelled and unshelled walnut rates should take the same increase of 5% (Appendix pp. 348a-349a).

ample, *City of Chicago* v. *U. S.*, 396 U. S. 162 (1969); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1969); *Association of Data Processing Service Organizations, Inc.* v. *Camp, Comptroller of the Currency*, 397 U. S. 150 (1970); and *Barlow* v. *Collins, Executive Director, Alabama Agricultural Stabilization & Conservation Service*, 397 U. S. 159 (1970)).

The position of the Government is that only the Commission's determinations as to railroad costs and revenue needs are reviewable at this time but that other issues require further administrative action before becoming ripe for review.* The railroads go even further and assert that nothing decided in a general revenue proceeding is final or immune from subsequent relitigation before the Commission.

Both these positions are unrealistic, and are not contemplated by the Interstate Commerce Act.

The Substantive Issues Determined in a General Revenue Proceeding are not Subject to Relitigation under the Interstate Commerce Act.

As more fully stated in Appellants' initial brief, among the issues necessarily to be considered in a general revenue

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* Appellants believe that this is a correct statement of the position of the Government from language which appears at various places in its brief. However, at other places therein, the Government brief seems to argue for far broader reviewability. For example, at page 21 thereof it notes that:

> "Insofar as the appellants in *Atlantic City Electric* attack the Commission's failure, in the general rate proceeding, to consider costs, revenue needs and *rate of return on a commodity-by-commodity* basis the United States believes that they state a claim for judicial review . . ." (Unless otherwise stated, all emphasis in this brief is added.)

At page 44, commenting upon paragraphs 12 and 14 of Atlantic City's complaint, the Government states:

> "The United States interprets these allegations [in paragraphs 12 and 14] as amounting to a general objection that the Commission misapprehended the issue as to revenue needs and *should have considered the railroads' needs commodity-by-commodity rather than in gross.* In the view of the United States such an objection . . . is subject to direct judicial review."

proceeding are not only general revenue needs, but whether such needs will be met by the proposed rates. In other words, the Commission is bound under the statute* to consider whether the proposed rates will not in fact divert traffic from the carriers and hence reduce, rather than increase, revenues. Whether the proposed rates would in fact result in diversion was a primary issue raised by these Appellants in the general revenue proceeding, and the total lack of evidence to support the Commission's findings in this regard was one of the primary grounds for reversal set forth in these Appellants' complaints. The position of the Commission and the United States as well as the carriers would require Appellants to attempt to relitigate this issue in a §13 and §15 proceeding.

However, §§13 and 15(1) of the Act do not contemplate determination of diversion on a commodity-by-commodity basis in proceedings brought thereunder. Such proceedings are merely to determine whether particular rates are "just and reasonable" and are not "unjustly discriminatory or unduly prejudicial or preferential". Moreover, the sanctions imposed by §§13 and 15, i.e., reparations to the shipper, could hardly be applied to a carrier who established that its rates are just, reasonable, nondiscriminatory and nonpreferential. However, particular rates could meet all of these criteria of §§13 and 15 and still, because of competitive factors, be high enough to drive traffic off the rails. Whether diversion on a commodity-by-commodity basis will result from a general revenue increase is precisely what the Commission is mandated to consider at the time general rate increases are proposed, that is, in a general revenue proceeding, before permission to increase rates is granted.

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* As the Government concedes in its brief in its "rule of ratemaking" discussion at pages 4-5 thereof.

Since this is the time such determination is made finally, it is also the time when such determination becomes judicially reviewable.

Lack of Finality of Findings in General Revenue Proceedings Would Cause Administrative Chaos.

For an illustration of the chaotic effects of the alternatives suggested by the railroads and the Government, reference may be had to what could occur if their suggestions were adopted in this case. A group of utility coal shippers contended in the general revenue proceeding in the Commission that the coal freight rates to the Northeast would drive coal traffic from the rails, in favor of oil and nuclear energy. A "Sub-Part" of the general revenue proceeding was set up purportedly to hear this contention. In another Sub-Part relating to grain, State Appellants raised the same contention with regard to diversion of grain traffic which would result from the proposed rates. It is now suggested by the Government as well as the carriers that the proceedings in such Sub-Parts were a nullity; that the findings made therein were not final and hence are not reviewable, and that the issues raised therein are all subject to being relitigated and should be relitigated in §13 and §15 proceedings.

As has been noted above, any action under either of these sections of the statute cannot properly include the issue of diversion. However, assuming the statute permitted such relitigation, it is plain that the remedy proposed would create a far worse burden on the carriers, the Commission and the shippers than would the procedure actually followed below.* Each of the utilities who participated in the Com-

* It should be noted that the Appellants do not argue against the procedure of setting up sub-parts in the general revenue proceeding to hear such issues; their quarrel is with the manner in which such hearings were conducted and with the insufficiency of the evidence produced therein to support the Commission's findings.

mission proceedings below, under the railroads' and the Government's view of finality, must now seek to relitigate this issue of diversion as to their individual movements of traffic. Similarly, each of the hundreds of other shippers who participated in the Sub-Part Nos. 3-11 proceedings below, must proceed in the same fashion.

Since there is no time limit (not even laches, which might be applicable to seeking review of the order in a general revenue proceeding) to the institution of a §13 or §15 proceeding, there is no way in which the Commission can consolidate into a single hearing the multiplicity of proceedings which could well be instituted over an extended period. Furthermore, no one shipper could be bound in any way by determinations of any of these issues in any other hearing to which he was not a party. It appears, therefore, that the Commission could be inundated with §§13 and 15 proceedings, each of which would be judicially reviewable. Moreover, if a reasonable proportion of the shippers were ultimately successful in having the rates overturned as to them, the effectiveness of the Commission's general revenue order increasing railroad revenues could be substantially diluted.

It is far more sensible to hear, in one proceeding, with finality, evidence as to the competitive effect of coal rates to the Northeast than it would be, as the Government and railroads propose, to have separate litigations under §§13 and 15 (if this issue were at all cognizable under such sections) as to whether coal freight rates would reduce traffic respectively to the Atlantic City Electric Company, Public Service Electric & Gas Company, Rochester Gas and Electric Corporation, Niagara Mohawk Power Corporation, Central Hudson Gas & Electric Corporation, Orange and Rockland Utilities, Inc., Consolidated Edison Company of New York, Inc., Long Island Lighting Company, Jersey Central Power and Light Company, New Jersey Power and Light Company and Metropolitan Edison Company, all of

whom were parties to the Interstate Commerce Commission's Sub-Part No. 3 proceedings.* Not only is it more economical in terms of time to try the issue in a general revenue proceeding, but it also gives the Commission the opportunity, if it finds that possible diversion precludes the full requested increase on one commodity, to make necessary adjustments in other rates to produce required overall railroad revenues. Such adjustment in other rates could not be made as part of a §13 or §15 proceeding.

Similarly, the issues of whether the coal and grain traffics overall provide the railroads with unduly high contributions in excess of the related costs of service, can much more economically be litigated in a single proceeding to which all such shippers can be party and by which they would all be bound. To achieve this objective, however, also requires that the determinations made in such a proceeding be final and judicially reviewable. The Commission itself recognized the necessity for this finality in general revenue orders in the *Koppers* case (*Koppers Co. Inc.* v *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383 (1958)). Its decision therein was completely correct for the reasons noted above.

Relitigation in the Commission Cannot Protect Procedural Rights

Finally, these Appellants once more emphasize that they have a constitutional and a statutory right to procedural safeguards in a general revenue proceeding. Even if one could accept the Government's contention that violation of these procedural rights is reviewable in a §13 or §15 proceeding, as to which we have already detailed our disagree-

* The question of diversion from the rails of utility coal traffic was also raised by other coal shippers, including some of the *Alabama Power* appellants, in the Sub-Part No. 3 proceedings below.

ment, it is obviously far more expeditious to have final Commission action and procedures reviewed in an appeal from the general revenue proceeding than to require the shippers to undertake first a multiplicity of §§ 13 or 15 proceedings, each of which will consider the identical record of the general revenue proceeding.*

Judicial review of the totality of general revenue orders is the most expeditious and least burdensome procedure for determining propriety of the decision on the issues therein.

Judicial Review at this Stage is Practicable

If judicial review of the Commission's order is mandated now by this Court, the carriers conjure up a vision of shippers bringing review proceedings from general revenue order in virtually every district court in the United States. Review proceedings from the order in Ex Parte 259 thus far have been brought in only two district courts in the United States. Even if future proceedings should cover a wider geographical area, it seems fair to assume that the judicial apparatus that has handled such mammoth litigations as the electric anti-trust cases with a minimum of disruption could deal with such appeals on an expeditious basis.

The Government notes in its brief that there are various ways of handling the problem, should it arise. These include the venue transfer provisions (28 U.S.C. § 1404(a)) of the Judicial Code, and the use by the district courts of their discretion to stay cases pending before them until

* Since in each such case, the shipper would be asking the Commission to find that it had committed procedural error in the general revenue proceeding, obviously each such proceeding would be merely a prelude to a district court review which would only then, in the Government's view, be appropriate.

the outcome of the original suit is known. Either of these suggestions appears highly appropriate.*

Additionally, consideration might be given to the appointment of a Special Master on behalf of all the district courts before whom actions were started. He could hear the evidence and report thereon to each of the district courts on the issues pertinent to the action pending in that district. Such use of a Special Master (the normal procedure in original actions in this Court) would appear to be a wise economy of judicial time.

The Government suggests that the *Atlantic City* case should be stayed until a decision is reached in *Alabama Power*. *Alabama Power* raises narrower contentions than *Atlantic City Electric*, and it is respectfully submitted that such a stay would be improper. If the cases are remanded, they could be tried before a Special Master appointed by the two courts, as discussed above.

This Court cannot properly decide the merits of this action.

Appellants' complaint below was dismissed on a motion made by the Commission and joined in by the railroads on the grounds that it failed to state a claim upon which relief could be granted. The court never decided the merits of the complaint. It is absurd to now contend that this Court should consider the sufficiency of the evidence in a 5,074 page record. Neither should the Court rely, as the railroads suggest, upon the ICC's own decision as authority for the adequacy of the evidence underlying that decision.

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* There is no time limit specified for judicial review under the Interstate Commerce Act, but as a practical matter any appellant who did not bring his action in adequate time to consolidate with other pending review proceedings could well be deemed guilty of laches and his action barred on that basis.

CONCLUSION

Both cases should be remanded for trial with direction from this Court that the order of the ICC is now judicially reviewable in its entirety.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 106

ALABAMA POWER COMPANY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Columbia

PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 106

ALABAMA POWER COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Columbia

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PETITION FOR REHEARING

Appellants respectfully move this Court for an order: (1) vacating its affirmance, by an equally divided Court, of the judgment of the court below; and, (2) either directing reargument or reversing the aforesaid judgment without reargument. The grounds for this motion are as follows:

The issue in this case is whether orders of the Interstate Commerce Commission authorizing nationwide increases in freight rates are subject to judicial review. This is an issue of tremendous importance to users of

rail service as well as to their customers and the general public which must ultimately pay such increases.

By an equally divided vote, the Honorable Justice Douglas not participating, a lower Court decision has been affirmed which holds that such an order is not subject to judicial review.

We earnestly hope that this issue can now be considered and decided by the entire Court and thus settled one way or the other. See *Ladner* v. *United States*, 355 U.S. 282, 356 U.S. 969, 358 U.S. 169; *Bartkus* v. *Illinois*, 355 U.S. 281, 356 U.S. 969, 359 U.S. 121. To this end we ask that the affirmance of the court below be vacated and a rehearing granted.

Respectfully submitted,

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CERTIFICATE

As Counsel for Appellants, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

CHARLES J. McCARTHY

Supreme Court, U.S.
FILED
DEC 30 1970
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1970

No. 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

PETITION FOR REHEARING

Appellants Atlantic City Electric Company, Niagara Mohawk Power Corporation, Public Service Electric and Gas Company and Rochester Gas and Electric Corporation hereby respectfully petition this Court for an order vacating its judgment herein and restoring the case to the docket for reargument. The decision below was affirmed by an equally divided Court, Mr. Justice Douglas taking no part in the consideration or decision of the case.

While Mr. Justice Douglas did not participate in two early procedural motions in this case, these appellants were unaware, until commencement of oral argument, that he might not participate in considering or deciding this matter. Had appellants known prior thereto that he would abstain from participation they would have sought to make known to the entire Court, if deemed proper, their belief that his participation would be unobjectionable and desirable in the public interest. Appellants' position is unchanged.

Therefore, these appellants respectfully urge the Court to grant this petition for rehearing; and further respectfully request that Mr. Justice Douglas participate in consideration of this petition, and, if granted, that he participate in the ultimate decision of this case.

The Grant of Rehearing Now is the Most Appropriate Manner in Which to Settle the Question Raised

The question here before the Court is obviously important, as the Court recognized when it decided to take jurisdiction of this appeal. It affects not only every shipper and consumer of railroad-transported commodities in the United States, but also the economic welfare of the nation and of the railroad industry. That question is: Does immunity from judicial review attach to the procedures followed by the Interstate Commerce Commission during an investigatory hearing on a general rail rate increase, and to the final order deciding issues raised therein?

The present state of the law with respect to this question remains unsatisfactory to all concerned, since the Court's affirmance of the decisions below* is not a legal precedent and may not be relied on as controlling in future cases. At the same time it leaves appellants in this case without a remedy. It would seem more equitable for reargument to be heard by the full Court now than for appellants to incur the burden and expense of prosecuting a new complaint proceeding in a District Court, arising out of a later Commission decision.

Subsequent to the general revenue proceeding which is the subject of this case, the Commission has reached a final decision in another general freight rate increase (Ex Parte

* In the companion case to No. 78, *Alabama Power Co., et al.* v. *U.S.A. and I.C.C., et al.* No. 106, there was a strong dissent by Hon. H. Skelly Wright.

262). It also has rendered interim decisions in two later general freight rate increases. A complaint arising out of the increase on which the Commission has reached its final decision (Ex Parte 262) is presently pending in the United States District Court for the Southern District of New York. It is probable and certainly reasonable to suppose that other complaints will be filed with respect to both this decision and the other two pending increases, as soon as the Commission makes its ultimate determinations therein. For the guidance of the federal district courts below in deciding these suits it is respectfully urged that the full Court should reconsider the case at bar and render its decision.

This Matter is Important to the Economic Life of the Nation and Requires Decision by the Full Court

As noted above, since the commencement of this proceeding by the Interstate Commerce Commission in 1968, there have been three subsequent general revenue increase proceedings conducted by that Commission. The first, designated Ex Parte 262, raised rail freight rates on all commodities by 6%. The second, known as Ex Parte 265, raised rail rates on all commodities an additional 6%. A final decision in this matter has not yet been rendered, but in view of subsequent developments, outlined below, it appears highly unlikely that the final decision will order any reduction in this increase. The third, Ex Parte 267, wherein the railroads requested a 15% increase on virtually all commodities, has been decided on an interim basis by the Commission, which has permitted the railroads to raise rates immediately by 8% while it considers the full request of 15%. Thus, within approximately three years the Interstate Commerce Commission has allowed overall freight rate increases of approximately 30% to be imposed on the nation's rail traffic.

Despite the granting of every increase requested by the railroads to virtually the full extent requested, railroad earnings have declined, and the industry appears now to be in a worse position than it was in 1968. These appellants have consistently argued before the Commission that the grants of these across-the-board rate increases were neither adequately supported by the record compiled in the Commission's proceedings nor a satisfactory avenue of assistance to the railroads, since they have resulted in diversion of substantial traffic from the roads.

It is therefore respectfully urged that the Court grant this petition for rehearing in view of the gravity of the issues at bar; and also that Mr. Justice Douglas participate in the consideration and ultimate decision of this case.

Respectfully submitted,

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Dated: December 31, 1970.

Certificate

As Counsel for Appellants, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

JAMES O'MALLEY, JR.